Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DOW JONES & COMPANY, INC., THE *LOS ANGELES TIMES*, ABC, INC., THE ASSOCIATED PRESS, CABLE NEWS NETWORK, INC., CBS BROADCASTING INC., FOX NEWS NETWORK, NATIONAL BROADCASTING COMPANY, INC., THE NEW YORK TIMES COMPANY, TIME INC., *USA TODAY*, AND *THE WASHINGTON POST*,

Petitioners,

v.

PRESIDENT WILLIAM JEFFERSON CLINTON, THE WHITE HOUSE, INDEPENDENT COUNSEL KENNETH W. STARR, MONICA LEWINSKY, AND FRANCIS D. CARTER,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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87 pp

QUESTION PRESENTED

Whether the court of appeals erred in holding that the First Amendment provides no right of public access to judicial hearings that are ancillary to grand jury proceedings and involve matters of substantial public importance and interest, such as the legal validity of the President's assertions of executive and attorney-client privilege.

LIST OF PARTIES

All of the parties to the proceeding in the court below are listed in the caption.

RULE 29.6 STATEMENT

1. Dow Jones & Company, Inc., has no parent companies, and has the following nonwholly owned subsidiaries: Dow Jones Publishing Company (Asia), Inc.; and IDD Enterprises, L.P.

2. The *Los Angeles Times* is a division of The Times Mirror Company, which has no parent companies, and which has the following nonwholly owned subsidiaries: Los Angeles Times/Washington Post News Service, Inc.; Lozano Communications, Inc.; TMCT, LLC; and Times Mirror License, Inc.

3. Time Inc.'s parent companies are Time Warner Companies, Inc. and Time Warner Inc. Time Inc.'s nonwholly owned subsidiaries are Thrive Partners and American Family Enterprises.

4. The Associated Press is a non-profit membership corporation that has no parent companies or nonwholly owned subsidiaries.

5. *USA Today* is published by Gannett Satellite Information Network, Inc., the parent company of which is Gannett Co., Inc. Gannett Satellite Information Network, Inc. has no nonwholly owned subsidiaries.

6. Cable News Network Inc.'s parent company is Turner Broadcasting System, and it has no nonwholly owned subsidiaries.

7. ABC, Inc.'s parent companies are Disney Enterprises, Inc. and The Walt Disney Company, and it has no nonwholly owned subsidiaries.

8. CBS Broadcasting Inc.'s parent company is CBS Corporation, Inc., and its nonwholly owned subsidiaries are as follows: Bala Cynwyd Associates; The CBS/FOX Company; Meadowlands Parkway Associates; and Station Holdings B Inc.

9. *The Washington Post* has no parent company, and has the following nonwholly owned subsidiaries: Capitol Fiber, Inc.; I.H.T. Corporation; International Herald Tribune, S.A.; Los Angeles Times/Washington Post News Service, Inc.; Moffett, Larson & Johnson, Inc.; and The Photo Store LLC.

10. Fox News Network's parent company is The News Corporation. Fox News Network has no nonwholly owned subsidiaries.

11. The New York Times Company has no parent companies, and has the following nonwholly owned subsidiaries: Donohue Malbaie, Inc. and I.H.T. Corporation.

12. National Broadcasting Company, Inc.'s parent companies are National Broadcasting Holding, Inc., and General Electric Company, and its nonwholly owned subsidiaries are as follows: MSNBC Cable L.L.C.; CNBC International Productions, L.L.C.; MSNBC Interactive, L.L.C.; Station Venture Operations, L.P.; Station Venture Holdings, L.L.C.; NGC Network, L.L.C.; and Peter Engel Productions, L.L.C.

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Petitioners Dow Jones & Company, Inc., the *Los Angeles Times*, ABC, Inc., The Associated Press, Cable News Network, Inc., CBS Broadcasting Inc., Fox News Network, National Broadcasting Company, Inc., The New York Times Company, Time Inc., *USA Today,* and *The Washington Post* respectfully submit this petition for a writ of certiorari to review the judgment of the court of appeals in this case.

The question presented by this petition is an important and recurring one. Issues of manifest public interest and significance arise repeatedly in the context of judicial proceedings that are ancillary to ongoing grand jury investigations, but the decision of the court below will frustrate the ability of the public to be informed about these important matters in a timely and meaningful fashion. The need for public access and openness is particularly strong in this case, which involves, among other things, assertions of executive privilege by the President. The court of appeals' rejection of the First Amendment claim conflicts with the decisions of other circuits and this Court and contradicts the strong history of open judicial hearings on analogous issues, dating back to the grand jury proceedings concerning the treason charges leveled against Aaron Burr and the Watergate investigation of President Nixon.

This Court's review is necessary both to eliminate the confusion that currently reigns in the courts of appeals regarding the proper legal test for resolving claims of access to judicial proceedings, and to ensure the free flow of information that is central to the proper functioning of the judicial system and the democratic process.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) has been designated for publication but is not yet

reported. The relevant orders of the district court, which are not reported, include an order of February 27, 1998 (App., *infra*, 26a-27a), three orders issued March 18, 1998 (App., *infra*, 28a-37a), and an order of March 20, 1998, delivered verbally during a closed-door hearing (App., *infra*, 40a-43a).

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1998, and this petition is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). As the court of appeals found, although the case deals in part with the district court's refusal to allow the public "to attend hearings now concluded, the capable-of-repetition-yet evading-review doctrine" applies, App., *infra*, 4a n.3, and "require[s] the conclusion that this case is not moot." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6 (1986) (hereinafter "*Press-Enterprise II*").

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

The text of Federal Rule of Criminal Procedure 6(e) is set forth at App., *infra*, 38a. The text of Local Rule 302 of the United States District Court for the District of Columbia is set forth at App., *infra*, 39a.

STATEMENT OF THE CASE

A. Proceedings In The District Court

Independent Counsel Kenneth W. Starr, on behalf of the United States, is presenting evidence to a grand jury in Washington, D.C., pursuant to a January 16, 1998 grant of expanded jurisdiction. In one of the most widely publicized and debated criminal investigations in the history of the United States, Mr. Starr has been authorized to investigate matters of high public interest relating to alleged conduct of the President and other current or former governmental officials and employees, including possible obstruction of justice and perjury. App., *infra*, 2a. This aspect of the Independent Counsel's inquiry, in particular, has received widespread attention since it became public on January 21, 1998.[1] Petitioners are news organizations that are reporting to the public on this investigation.

In recent months, petitioners have made several requests to the United States District Court for the District of Columbia seeking public access to judicial proceedings and records regarding legal issues arising from the investigation. Petitioners made clear from the outset that they are *not* seeking access to material or proceedings that would reveal "matters occurring before the grand jury" and would therefore be covered by Federal Rule of Criminal Procedure 6(e). *See, e.g.*, JA 0144-45.[2]

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[1] *See, e.g.*, Susan Schmidt et al., *Clinton Accused of Urging Aide to Lie; Starr Probes Whether President Told Woman to Deny Alleged Affair to Jones's Lawyers*, Wash. Post., Jan. 21, 1998, at A1.

[2] "JA" refers to the Joint Appendix filed by the parties in the court of appeals.

The first request for access was filed on February 11, 1998, and sought to unseal President Clinton's motion to show cause seeking contempt sanctions against the Independent Counsel for alleged violations of grand jury secrecy rules. JA 0049-63. On February 24, the district court filed a sealed order granting the motion to unseal and ordering that the President's papers relating to his motion to show cause be immediately released to the public. App., *infra,* 23a-25a.

On February 26, 1998, a group of petitioners filed a motion seeking to unseal judicial records and transcripts "in all litigation concerning the assertion of executive privilege," JA 0142, 0165, which they defined to embrace assertions of any official privilege peculiar to the Executive Branch, including assertions of the so-called presidential communications privilege and of attorney-client privilege when made by the President with respect to Executive Branch attorneys. *Id.* at 0144, 0169 n.1. That motion also asked that "any future proceedings" relating to assertions of executive privilege "be open to the public." *Id.* at 0142. The motion papers made clear that petitioners sought access "limited to those portions of the record and/or proceedings which reveal the substance of the legal arguments[,] . . . any rulings or opinions issued by the Court, and any other items *which do not reveal matters occurring before the grand jury itself.*" *Id.* at 0145 (emphasis added).

In a sealed February 27 order, the district court denied the executive privilege access motion, stating: "The motion requests access to certain papers believed to have been filed with this Court. No such papers exist. Movants' request must be denied because it is not ripe." App., *infra*, 27a. The court also held that the request for access to future executive privilege hearings "is premature. [The Court] is unable to find that continued seal-

ing of a nonexistent matter is or is not 'necessary to prevent disclosure of matters occurring before the grand jury.'" *Id.* (quoting Local Rule 302).

On March 4, petitioners learned, through their own newsgathering efforts, that a judicial hearing would be held that day on attorney-client privilege objections made by Francis D. Carter—Monica Lewinsky's former attorney—to a grand jury subpoena. The district court had not given advance public notice of this hearing. Petitioners submitted a motion asking to be heard on the issue of the public's right of access to this hearing. JA 0086. The district court declined to address petitioners' request at that time, and the hearing on the privilege issue continued for several hours behind closed doors.

To address both the district court's February 27 "ripeness" ruling and its convening of unannounced closed-door hearings, petitioners filed a motion on March 9, 1998, requesting that the district court provide the public with advance notice of, and an opportunity to object to, closure of any judicial proceedings, and that the district court issue specific findings explaining why all or part of any hearing must be closed. JA 0091-0111. The Independent Counsel took "no position" on this motion. *Id.* 0092.

The district court continued to hold unannounced closed hearings. On March 11, 1998, petitioners filed a motion seeking access to hearings concerning the President's already unsealed show-cause motion. JA 0112. The following day petitioners learned (again through their own newsgathering) that such a hearing was scheduled for 2:00 p.m. After determining that the President and the Independent Counsel had not filed responses to petitioners' March 11 motion, however, the district court decided that it would be premature to rule

on the motion and ordered that the hearing would be closed to the press and the public.[3]

On March 18, the district court issued three sealed orders denying petitioners' motions for access to the show-cause and Carter proceedings, and rejecting petitioners' motion to establish procedures with respect to the closure of future proceedings. App., *infra,* 28a-37a. The court held: "The news organizations do not possess either a common law right or a First Amendment right to access to these proceedings." *Id.* at 33a, 36a. The court incorrectly treated petitioners' motions as requesting access to "grand jury materials" and "grand jury proceedings," all of which it said are "presumptively secret." *Id.* at 31a, 33a, 37a. Petitioners immediately appealed to the court of appeals.

Then, on March 20, without any advance public notice, the district court held a closed-door hearing relating to the President's assertions of executive privilege concerning the testimony of White House officials Sidney Blumenthal and Bruce Lindsey, who also claimed attorney-client privilege. The only stated justification for closure of the hearing was that "it would be too disruptive to stop the hearing and clear the courtroom every time that Rule 6(e) materials is to be mentioned." App.,

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[3] This ruling was made by the district court orally at the start of the March 11 hearing, at which counsel for petitioners was present. Subsequent to that ruling, counsel for petitioners was escorted out of the courtroom, and the hearing then continued on the merits without counsel for petitioners being present. Despite petitioners' requests, no transcript of that hearing, and thus no record of the district court's ruling, has been made available to petitioners or the public as of the filing of this petition.

infra, 40a-43a.[4] More than two months after that hearing was held, the district court, on May 26, 1998, ordered that a redacted version of the transcript of that hearing be released. (Copies of that transcript, although not a part of the record below, are being lodged with the Court in connection with the filing of this petition.)

B. Proceedings In The Court of Appeals

On appeal, petitioners argued, *inter alia*, that the district court's orders denying notice of and access to judicial proceedings ancillary to the ongoing Independent Counsel investigation violated the First Amendment. Pet. C.A. Br. 9-37. The court of appeals squarely rejected petitioners' First Amendment claim and upheld the district court's orders in this respect.

The court of appeals expressly held that the First Amendment creates no right of access to judicial hearings ancillary to a grand jury investigation. App., *infra*, 13a-17a.[5] The court conceded that "assertions of executive privilege are rightly matters of intense public interest" and that "[t]here . . . can be no doubt of the value of public scrutiny of assertions of executive privi-

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[4] The small portion of the transcript included in the appendix was unsealed by the court of appeals prior to its ruling, and was part of the record below.

[5] While the court of appeals' opinion contains a discussion of the district court's Local Rule 302, App., *infra*, 8a-11a, that discussion did not affect the court of appeals' resolution of petitioners' claim under the First Amendment for access to the ancillary hearings. Petitioners did not mount a facial challenge to the local rule in the court of appeals because the district court did not rely upon that local rule in denying petitioners' motions for access, and because the mere existence of the local rule was irrelevant to whether the public has a First Amendment right of access.

lege." *Id.* at 16a. The court recognized, moreover, that during the Watergate investigation "Chief Judge Sirica held an open hearing on President Nixon's very public refusal to comply with a grand jury subpoena duces tecum on the grounds of executive privilege" (*id.* at 15a), and noted that a 1980 report by the General Accounting Office concluded that a majority of district judges interviewed either "'routinely hold preindictment proceedings in open court'" or "'decide when to open or close them on a case-by-case basis.'" *Id.* at 15a. Nonetheless, the court of appeals concluded that there was no First Amendment right of access to such proceedings, because in the court's view "there is no strong history or tradition in favor of" such a right. *Id.* at 13a.

The court of appeals recognized that, where a constitutional right of access exists, the First Amendment requires both an opportunity to be heard before a motion to seal is granted and specific findings on the record to justify sealing. App., *infra*, 17a. Based on its conclusion that the First Amendment is not implicated by closed judicial hearings on matters of public interest that are ancillary to a grand jury investigation, however, the court rejected petitioners' request that those procedural protections be afforded in this case. *Id.*

The court of appeals also announced that the First Amendment imposed no requirements whatsoever on the district court to make any effort to conduct "open ancillary hearings in a way that would not reveal grand jury matters." App., *infra,* 15a. The court found it "ridiculous" even to suggest that the First Amendment might give the public a right to ask that judicial hearings, including those convened to resolve the legal dispute between the Independent Counsel and the President over executive privilege, be structured, if reasonably possible, in a manner that both protected grand jury se-

crecy and allowed the public to attend and witness the arguments. *Id.* at 11a-12a. The court also rejected petitioners' contention that the First Amendment imposed timeliness requirements in this matter concerning public access to hearings, transcripts and briefs. The court thus affirmed the district court's exclusion of the public from the executive privilege, show cause and Carter hearings.[6]

REASONS FOR GRANTING THE WRIT

A. The Question Presented Is Important, Recurring And Substantial

This case presents exceedingly important issues concerning the public's rights to scrutinize judicial proceedings adjudicating fundamental legal issues, such as claims of executive privilege, arising from an Independ-

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[6] The court remanded for reconsideration of the limited question whether district court Local Rule 302 required sealed pleadings regarding grand jury matters to be recorded on the public docket under a designation such as "*In re Grand Jury Proceedings*." App., *infra*, 17a. The court made clear, however, that it was not mandating the additional procedural protections (including notice and an opportunity to be heard before closure) required by the First Amendment. *Id.*

Applying Rule 6(e) and Local Rule 302, the court also vacated and remanded for further consideration the district court's denial of petitioners' request for access to specific papers and transcripts pertaining to the Carter privilege issue, and affirmed the district court's denial of access to the show-cause hearing transcripts. App., *infra*, 18a-22a In all other respects, the district court's orders were affirmed. *Id.* at 22a. In this Court, petitioners do not challenge the court of appeals' interpretation of Rule 6(e) or Local Rule 302.

ent Counsel's investigation of a sitting President. The court below held that the First Amendment supplies the public with no rights of access whatsoever to such proceedings, and as a result the American people were barred from attending the judicial hearings, and were kept in the dark for months about the arguments and rulings concerning the historic dispute between Independent Counsel Starr and President Clinton regarding the meaning and scope of the executive privilege doctrine. Even the court of appeals recognized that "[t]here can be no doubt" either that these are "rightly matters of intense public interest" or "of the value of public scrutiny of assertions of executive privilege." App., *infra*, 16a.

Review by this Court is warranted to decide whether the First Amendment creates a presumptive "right of access" to these sorts of judicial proceedings. This Court a half century ago declared that "what happens in the court room is public property," *Craig v. Harney*, 331 U.S. 367, 374 (1947), and this is all the more true where, as here, the legal proceedings involve disputes between high-ranking public officials, including the President of the United States and an Independent Counsel empowered to act on behalf of the United States and to exercise the Executive Branch's prosecutorial power in investigating the President.

This Court and the lower federal courts have already recognized that the First Amendment right of access applies to a wide range of judicial proceedings, including "preliminary hearings" designed to determine whether "probable cause" exists to try an accused of a crime, *Press-Enterprise II,* 478 U.S. at 10-13, voir dire, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-13 (1984) (hereinafter "*Press-Enterprise I*"), and criminal trials. *Globe Newspaper Co. v. Superior Court*,

457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Among other things, these cases hold that where the First Amendment applies, "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspapers*, 457 U.S. at 609 n.25 (quoting *Gannet Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)). The proceeding "cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II*, 478 U.S. at 13-14 (quoting *Press-Enterprise I*, 464 U.S. at 510). And the First Amendment requires that courts allow *timely* access—contemporaneous access to all or part of the live proceeding if possible.[7]

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[7] *See Richmond Newspapers*, 448 U.S. at 597 n.22 (Brennan, J. concurring in judgment) ("[T]he availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the courtroom."); *United States v. Antar*, 38 F.3d 1348, 1360 n.13 (3d Cir. 1994) ("[D]ocumentary access is not a substitute for concurrent access, and vice versa. The right of access encompasses both forms, and both are vitally important."); *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (recognizing, under the First Amendment, "the *critical importance* of *contemporaneous* access. . . to the public's role as overseer of the criminal justice process") (emphasis added); *see also Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (holding that any delay in unsealing proceedings or records "is a total restraint on the public's first amendment right of access even though the restraint is limited in time"); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) (noting that government-imposed delays on publication can substantially fetter members of the press in their

In recognizing the existence of First Amendment rights in these other contexts, the Court has repeatedly emphasized the importance of such rights to our system of government. Indeed, public access to judicial proceedings is necessary "to protect the free discussion of governmental affairs" so that "the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co.*, 457 U.S. at 604. And the "value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enterprise II*, 478 U.S. at 13 (citation omitted). In short, openness is "essential to public confidence in the system." *Id.*; *see also Richmond Newspapers*, 448 U.S. at 572 (it is "difficult for [the public] to accept what they are prohibited from observing").

The Court has never addressed the First Amendment access question in the context of judicial proceedings ancillary to a grand jury matter or in connection with an Independent Counsel's investigation of a President, and this case presents an opportunity to resolve these important issues. The court of appeals' ruling rejecting the existence of a First Amendment right here effectively bars the public from meaningful and timely access to information of overwhelming public interest pertaining to the conduct of public servants at the highest levels of government, including the Independent Counsel, attor-

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ability to fulfill their "traditional function of bringing news to the public promptly").

neys acting on behalf of the United States and the White House, and the President of the United States. Public access to such information lies at the very heart of the First Amendment, and should not be summarily denied without adherence to strict procedural and substantive protections. This Court should grant certiorari to consider this important and pressing question.

B. The Circuits Are Divided Over The Proper Test For Determining Whether The First Amendment Presumption Of Public Access Is Applicable

The court of appeals incorrectly rejected petitioners' First Amendment claim because it misconstrued the test established by this Court in a manner that squarely conflicts with the decisions of other courts of appeals. Review by this Court is warranted to resolve this conflict.

This Court's precedents identify "two complementary considerations" to be examined in determining whether a particular judicial proceeding is subject to the First Amendment presumption of access. The first of these factors is "whether the place and process have historically been open to the press and general public," *Press-Enterprise II*, 478 U.S. at 8, a consideration deemed relevant because a "'tradition of accessibility implies the favorable judgment of experience.'" *Id.* (citations omitted). The second factor is "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* "These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes." *Id.* at 9.

In this case, the court of appeals held that the First Amendment right of access does not encompass judicial

hearings ancillary to grand jury proceedings—even hearings involving the President's assertions of executive privilege, "rightly matters of intense public interest"—because, in the court's view, the "history," or "experience," factor of the *Press-Enterprise II* test was not satisfied. The court reasoned that the history of public access to such proceedings does not include sufficiently numerous examples to constitute an "'unbroken, uncontradicted history.'" App., *infra*, 16a. Though not explicitly considering the "logic" factor of the *Press-Enterprise* analysis, the court of appeals virtually conceded that that factor militates in favor of public access here, observing that "[t]here . . . can be no doubt of the value of public scrutiny of assertions of executive privilege." *Id.* In the court's view, however, that "value" was not a sufficient basis for recognizing a First Amendment right of access. Thus, the court of appeals, as it had in prior decisions, held that the public must make a compelling showing under the "experience" factor as an absolute prerequisite to recognition of the First Amendment presumption of access with respect to a particular category of judicial proceedings.[8]

As shown below, this holding of the court of appeals conflicts with the rulings of other appellate courts in at least two respects. First, the court's holding is irreconcilable with decisions of other courts of appeals recognizing that a presumptive right of access may exist even where the experience factor does not militate in favor of access. Second, the ruling below conflicts with deci-

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[8] The D.C. Circuit took the same approach in *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997), and *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1332, 1336 (D.C. Cir. 1985) (Scalia, J.).

sions of this Court and other courts of appeals in imposing an unduly high burden on parties seeking to satisfy the "experience" factor.

1. The authorities are divided concerning "experience" as an absolute prerequisite. The D.C. Circuit's interpretation of the "experience" factor as an absolute prerequisite to the existence of a First Amendment right of access is directly contrary to decisions of the Second, Third and Ninth Circuits. The Second Circuit, in *United States v. Suarez*, 880 F.2d 626 (2d Cir. 1989), held that the First Amendment presumption of access applied to Criminal Justice Act ("CJA") forms approving payments to court-appointed counsel. The court noted that the CJA was "a fairly recent development," and that "there is no long 'tradition of accessibility' to CJA forms." *Id.* at 631. Despite this lack of "tradition," however, the court held that the "public's strong interest in how its funds are being spent in the administration of criminal justice" was sufficient reason to recognize a First Amendment presumption of access to the forms. *Id.* Thus, the court in *Suarez* recognized and applied the First Amendment presumption based *solely* upon the "logic" factor.

The Third Circuit, in *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994), held that the First Amendment presumption of access applied to post-trial hearings at which jurors were examined concerning allegations of juror misconduct. Comparing the case before it to the historical traditions canvassed by this Court in *Press-Enterprise I* and *Press-Enterprise II*, the court conceded that "[n]o such rich historical tradition exists with respect to post-trial examinations of jury misconduct." *Id.* at 837. The court explained that "[n]either the parties nor this court have been able to find cases dating before 1980 in support of either openness or closure for this

type of post-trial proceeding," and therefore concluded that the "experience" factor "provide[d] little guidance" in determining whether the First Amendment presumption applied. *Id.* at 838. Rather than reject the First Amendment claim outright, however, as would have been required under the approach followed by the court of appeals below, the *Simone* court held that "in making our determination we will rely primarily on the 'logic' prong of the test." *Id.* Based solely upon its conclusion that public access would "enhance the functioning" of such post-trial hearings—and despite the acknowledged lack of evidence of any "history" of public access—the court held that the First Amendment presumption applied. *Id.* at 839-40.

Similarly, in holding that the First Amendment presumption applied to pleadings submitted in connection with pre-trial bail hearings, the Ninth Circuit, in *Seattle Times Co. v. United States District Court*, 845 F.2d 1513 (9th Cir. 1988), concluded that the "experience" factor is *not* a necessary prerequisite. The court recognized that "[p]retrial detention proceedings do not share with criminal trials an unbroken history of public access." *Id.* at 1516. The court also noted that the specific type of proceeding at issue—a proceeding held pursuant to the Bail Reform Act of 1984, 18 U.S.C. § 3142(f)—was of recent vintage. "Under these circumstances," the court reasoned, "the historical tradition surrounding bail proceedings is much less significant." *Id.* Having found no evidence of any history of public access either to bail hearings generally or to § 3142(f) proceedings specifically, the court nonetheless turned to consideration of the "logic" factor, and concluded that "[o]penness of the proceedings will help to ensure this important decision is properly reached and enhance public confidence in the process and result." *Id.* at

1517. Thus, the court held that the First Amendment presumption applied. *Id.*

In contrast to the Second, Third and Ninth Circuits, the Fourth Circuit has explicitly refused to recognize a First Amendment presumption where a claimant fails to demonstrate an adequate history of access, thus interpreting the "experience" factor in a manner similar to the D.C. Circuit. In *The Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64-65 (4th Cir. 1989), the court held that no First Amendment presumption of access applied to search warrant affidavits. Referring to the two-factor "experience and logic" test of *Press-Enterprise II*, the court stated that "The Sun's claim of a first amendment right of access to the affidavit fails because it does not satisfy the first prong of the test." *Id.* Having so concluded, the court did not even consider the "logic" prong.

The Fifth Circuit has also treated the "experience" factor as an essential prerequisite. In *Calder v. Internal Revenue Service*, 890 F.2d 781 (5th Cir. 1989), the court rejected a claim that the First Amendment created a presumption of access to IRS records of Al Capone. The court first held that the "two-tier analysis" of this Court's First Amendment access cases did not apply, and that access to administrative records was a matter left to legislative determination. *Id.* at 783-84. The court then went on to hold in the alternative that "[e]ven assuming . . . the two-tier analysis applie[d]," no right of access to the IRS records existed. *Id.* at 784. Even though other individuals had been given access to the Capone files over the years, the court concluded that, more generally, the agency practice of providing access to such records was "rare and sporadic." *Id.* The court concluded that "[s]uch inconsistent government practice does not satisfy the 'historical openness' prong," and

held that therefore no First Amendment right would be recognized. *Id.* In so holding, the court did *not* consider the "logic" prong.[9]

2. The authorities are divided concerning the meaning of "experience." In this case, the court of appeals also held that the "experience" factor of *Press-Enterprise II* had not been established, even though the historical evidence reveals (and the court did not dispute) that analogous hearings were frequently held in open court prior to the 1983 adoption of Federal Rule of Criminal Procedure 6(e)(5). The court reached this conclusion because, in its view, the "experience" factor requires proof of an "'unbroken, uncontradicted history'" of access to the particular type of proceeding at issue. App, *infra*, 16a. That interpretation of the "experience" factor is inconsistent with decisions of this Court and of other courts of appeals.

This Court has never required proof of an "unbroken, uncontradicted history" of public access before the First Amendment right can be recognized. That phrase was used in *Richmond Newspapers*, 448 U.S. at 573, not as a statement of a legal test, but rather merely as an ac-

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[9] State courts attempting to implement the *Press-Enterprise II* test are similarly divided on the necessity of satisfying the history prong. *Compare, e.g., WBZ-TV4 v. Executive Office of Labor,* 610 N.E.2d 923, 925 (Mass. 1993) (holding that "[w]e need only address the first prong of [the *Press-Enterprise*] test" because test was not satisfied where no tradition of historical openness to proceeding existed) *with Greenwood v. Wolchik,* 544 A.2d 1156, 1158 (Vt. 1988) (holding that where proceedings or documents were "relatively recent additions to criminal prosecutions . . . it would be fruitless to engage in historical analysis" so that only relevant prong of analysis was logic, which supported access).

knowledgment that there was, in fact, an "unbroken, uncontradicted history" of public access to criminal trials. In *Press-Enterprise II*, for example, the Court concluded that the "experience" factor was satisfied by modern examples of open preliminary hearings, even though the Court recognized that "several States following the original New York Field Code of Criminal Procedure published in 1850 have allowed preliminary hearings to be closed on the motion of the accused." 478 U.S. at 10-11; *see also id.* at 21-25 (Stevens, J., dissenting) (discussing historical evidence of closed preliminary hearings). Indeed, defendants in California had historically had an "unqualified right to *close* the proceedings." 478 U.S. at 4 n.1 (emphasis added). Similarly, in *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993), the Court found a First Amendment right of access despite the contrary practice and traditions in Puerto Rico, the jurisdiction at issue. *Id.* at 149-51.

In keeping with this Court's interpretation of the "experience" factor, some courts of appeals have concluded that the "experience" factor can be satisfied by sparse or inconsistent evidence of openness. In *National Broadcasting Co. v. Presser*, 828 F.2d 340 (6th Cir. 1987), for example, the court found no clear historical evidence regarding the extent of past public access to hearings on attorney conflicts of interest. *Id.* at 345. Nonetheless, on the basis of one prior decision stating that such hearings could be conducted *in chambers* in "unusual circumstances," the Sixth Circuit concluded that the "experience" factor had been satisfied. *Id.* Moreover, in *Oregonian Publishing Co. v. United States District Court*, 920 F.2d 1462 (9th Cir. 1990), the court of appeals held that the "experience" factor favored recognition of a First Amendment right of access to plea agreements, citing no evidence other than the fact that

"[n]othing has been provided to suggest historical practice is to the contrary." *Id.* at 1465.

3. The court of appeals' application of the wrong legal standards changed the outcome in this case. The D.C. Circuit's application of the wrong legal standards plainly affected the outcome in this case. Both logic and experience, as those factors have been applied by this Court and other circuits, would compel recognition of a First Amendment right of access here.

a. Logic. Under the analysis utilized by the Second, Third and Ninth Circuits, the conclusion is inescapable that the First Amendment presumption of access applies to the judicial proceedings at issue here, even though the proceedings arise from an ongoing grand jury investigation.[10] The court below did not pur-

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[10] In *In re Grand Jury Subpoena*, 103 F.3d 234 (2d Cir. 1996), the Second Circuit agreed that it was at least "possible" that the First Amendment created a presumptive right of access to a hearing on a motion to force the government to disclose alleged electronic surveillance related to a grand jury investigation. *Id.* at 236, 242. The court found the presumptive First Amendment right outweighed by the need to protect grand jury secrecy in the particular circumstances of that case (*id.* at 242), but this decision suggests that the Second Circuit would recognize a First Amendment right of access to hearings under the circumstances at issue here. In *United States v. Smith*, 123 F.3d 140 (3d Cir. 1997), the Third Circuit held that there was no First Amendment right of access to a judicial hearing on whether the government had disclosed grand jury material in violation of Rule 6(e). That case is inapposite, however, because no attempt was made to prove that there had been public access to such proceedings in the past (123 F.3d at 147 n.8) and because, unlike the present case, an open hearing in *Smith* would necessarily have resulted in dissemination of grand jury secrets (*id.* at 150-52).

port to find a tradition of *closure* of such proceedings, but instead found only that there was no "unbroken, uncontradicted history" of sufficiently numerous open hearings. In those circumstances, the Second, Third and Ninth Circuits would require consideration of the "logic" factor.

The "logic" factor weighs strongly in favor of a right of access here. As the Third Circuit indicated in *Simone*, 14 F.3d at 839, the "logic" factor requires analysis of whether certain "societal interests" would be advanced by public access to the proceedings at issue. Among the "societal interests" identified by the Third Circuit are "'promotion of informed discussion of governmental affairs,'" "'promotion of the public perception of fairness,'" and "'serving as a check on corrupt practices by exposing the judicial process to public scrutiny.'" *Id.* (quoting *Smith*, 787 F.2d at 114).

All of these important societal interests would, for example, be served by public access to the executive privilege proceedings, and the court of appeals acknowledged as much when it noted the "intense public interest" in, and the undoubted "value of public scrutiny" of, assertions of executive privilege. App., *infra*, 16a. Public access to the arguments made by the President in support of assertions of executive privilege is a crucial check on the power of the Executive Branch. And without such access, the public—to whom the President ultimately is answerable—is deprived of the ability to judge those assertions.

Even if an assertion of executive privilege is *legally* well-grounded, the citizenry is entitled to decide that, in certain circumstances, such assertions are imprudent. The President's determinations whether to assert executive privilege clearly involve a mix of both legal and political considerations and calculations concerning

"public reaction." *See Legislation Providing for Court-Ordered Disclosure of Grand Jury Materials to Congressional Comms.*, 9 Op. Off. Legal Counsel 86, 93 (1985). Such decisions provide unique insight into an individual President's own view of the powers of the office. Thus, public access to such proceedings not only advances the general interest in preserving the integrity of the judicial process by "assur[ing] that established procedures are being followed and that deviations will become known," *Press-Enterprise I*, 464 U.S. at 508, but also serves the more specific function of assuring the integrity of, and public confidence in, the Executive Branch and its assertions of privilege. Accordingly, there can be no doubt that the "logic" factor weighs heavily in favor of public access to the executive privilege proceedings and, pursuant to the analysis utilized by the Second, Third and Ninth Circuits, that factor in and of itself compels recognition of a First Amendment presumption of access to those proceedings.

b. Experience. Under this Court's precedents properly understood, and the decisions of the Sixth and Ninth Circuits, the "experience" factor also weighs in favor of recognizing a First Amendment presumption of access to the proceedings at issue here. Indeed, although there is not an "unbroken, uncontradicted history" of such access, there is a strong history of openness that supports recognition of the First Amendment right.

In fact, the tradition of open hearings on matters ancillary to ongoing grand jury investigations may be traced back at least as far as the famous 1807 proceedings culminating in the trials of Colonel Aaron Burr. After a preliminary hearing (which, like all subsequent court proceedings in the case, was held in public in the hall of the Virginia House of Delegates, *see* Thomas

Perkins Abernethy, *The Burr Conspiracy* (hereinafter "*Burr Conspiracy*") 230-31 (1954)), Chief Justice John Marshall found the evidence insufficient to hold Col. Burr for trial on treason charges, but bound him over for trial on a misdemeanor charge. 7 *The Papers of John Marshall* (hereinafter "*Marshall Papers*") 13-21 (Charles E. Hobson ed. 1993). In response, the prosecution convened a grand jury on May 22 to investigate the charge of treason. *Id.* at 21.

The court proceedings that occurred between the May 22 empaneling of the grand jury and its return of an indictment on June 24, 1807, were apparently conducted entirely in open court. *Burr Conspiracy* at 230-31; *Trial of Col. Aaron Burr,* Virginia Argus, May 23, 1807 (the proceedings "drew together an immense concourse of citizens").[11] Indeed, the pre-indictment proceedings were attended by reporters for various newspapers and were "fully reported" by the Richmond *Enquirer* and the *Virginia Argus*. *Marshall Papers* at 11, editorial note; *Burr's Trial,* Virginia Argus, May 20, 1807 ("A full account of the proceedings, with the evidence and arguments of counsel will appear in this paper . . . ."). These public proceedings included a May 22 hearing at which Burr, in a chamber "thronged with curious spectators" (*Burr Conspiracy* at 234) challenged the composition of

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[11] At one point, Burr and his counsel requested that the first two rows of spectators be cleared since the "immense pressure of the spectators" prevented them from conferring without being overheard. *Trial of Col. Aaron Burr,* Virginia Argus, May 30, 1807. In response, the Chief Justice allowed the rearrangement of the courtroom (without removing any spectators altogether) while "express[ing] the wish of the court to accommodate all the spectators as far as might be practicable without interrupting their proceedings." *Id.*

the grand jury that had been convened on that date to investigate the treason charge (*Marshall Papers* at 21-22; *Trial of Col. Aaron Burr,* Virginia Argus, May 23, 1807; *Trial of Aaron Burr,* The Enquirer (Richmond), May 26, 1807), as well as hearings on June 9-13 on Burr's motion for a subpoena *duces tecum* requiring President Jefferson to produce documents relevant to the treason charge that was being investigated by the grand jury. *Burr Conspiracy* at 37; *Trial of Col. Aaron Burr,* Virginia Argus, June 10, 1807 & June 13, 1807; *Trial of Aaron Burr,* The Enquirer (Richmond), June 13, 1807.[12] The latter hearings, culminating in Chief Justice Marshall's decision granting Burr's motion (which was reported by the Richmond papers, *e.g., Trial of Col. Aaron Burr,* Virginia Argus, June 17, 1807 & June 20, 1807 raised sensitive issues of executive privilege analogous to those involved in this case.

Judicial consideration of an assertion of executive privilege ancillary to a grand jury investigation again took place in full public view when Watergate Special Prosecutor Archibald Cox subpoenaed tape recordings made by President Nixon. The historical record indicates that numerous hearings before Chief Judge Sirica—ancillary to the ongoing grand jury investigation—were held in open court, and that the briefs and rulings relating to the grand jury subpoena and privilege issues were made public immediately upon filing. Indeed, the docket sheet in that matter is filled with entries concerning hearings, filings and other proceedings, with

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12 According to one reporter in attendance at the June 10 hearing on this motion, Chief Justice Marshall noted the public nature of the proceedings by upbraiding counsel for "'endeavouring to excite the prejudices of the people'" through their remarks in court. *Marshall Papers* at 37.

only occasional bench conferences and conferences in chambers kept under seal. *See generally* Docket Sheet, *In re Grand Jury Proceeding,* United States District Court for the District of Columbia, Misc. Docket No. 47-73 (hereinafter "Docket Sheet") (specifically noting where documents or hearings ordered sealed by court).

The Special Prosecutor's July 23, 1973 subpoena to President Nixon was made public when it was issued. *See In re Subpoena to Nixon*, 360 F. Supp. 1, 3 (D.D.C. 1973); Carroll Kilpatrick & Susanna McBee, *Tape Battle Starts In Court Today,* Wash. Post, July 26, 1973, at A1, A18; Susanna McBee, *Court Battle Set as Nixon Defies Subpoenas,* Wash. Post, July 27, 1973, at A1, A22. The President's July 25, 1973 letter to the district court asserting that "the President is not subject to the compulsory process from the courts" also was made immediately public. *See In re Subpoena,* 360 F. Supp. at 3; *Court Battle Set, supra,* at A22. When the Special Prosecutor petitioned for a show cause order directed to the President, "a quorum of the grand jury was *polled in open court,* and each juror expressed his or her desire that the Court order compliance." *In re Subpoena,* 360 F. Supp. at 4 (emphasis added). The briefs were filed on the public record and their contents contemporaneously discussed at length in the press. *Id.* at 3-14; Docket Sheet, Jul. 26 ("Verified petition for an order directing Richard M. Nixon or any subordinate Officer whom he designates to show cause why certain documents or objects should not be produced in response to a grand jury subpoena duces tecum; Exhibits A, B & C; Filed In Open Court, Heard & Granted; Order Signed."); Susanna McBee, *Cox Presses Nixon On Tapes, ITT Data,* Wash. Post, July 28, 1973, at A1, A10.

The *Nixon* grand jury subpoena matter came on for hearing on August 22, 1973—in a courtroom "packed

with about 350 spectators." George Lardner, Jr., *Cox Sees 'Deceit' By Nixon on Tapes,* Wash. Post, Aug. 23, 1973, at A1, A3 (quoting arguments of special prosecutor Archibald Cox and Nixon attorney Charles Alan Wright). And when Chief Judge Sirica issued his *public* opinion a week later examining President Nixon's executive privilege claims and ordering that the President turn over nine tapes to the court for *in camera* inspection, President Nixon issued a public response announcing that he was considering appealing the order. George Lardner, Jr., *Sirica Wants To Listen to Nine Tapes,* Wash. Post, Aug. 30, 1973, at A1, A17 (quoting Judge Sirica's "23-page opinion").

The court of appeals' October 12, 1973 decision upholding Chief Judge Sirica's executive privilege rulings was issued on the public record. *Nixon v. Sirica,* 487 F.2d 700 (D.C. Cir. 1973). Thereafter, additional proceedings to enforce the grand jury subpoena were held in open court. On October 23, 1973, for example, a public hearing was held in which the "White House was to formally respond to [Chief Judge Sirica's] order to begin giving up the tapes." Bob Woodward & Carl Bernstein, *The Final Days* 72-74 (1976). The October 23, 1973 hearing occurred in a "crowded courtroom," *id.* at 73, and is described in some detail in *The Final Days*, including the dramatic moment when the President's lawyer

> rose to announce that the President would comply in full. "This President does not defy the law." The courtroom was silent for a few seconds. Flabbergasted, Sirica broke into a grin. "The court is very happy the President has reached this decision," he said. Reporters almost fell over themselves racing to the telephones.

Id. at 74; Docket Sheet, Oct. 23 ("Counsel for the President informs Court President will comply with Court's order of 8-29-73 & will turn over tapes & other objects.").

The history of Federal Rule of Criminal Procedure 6(e), which "codifie[d] the traditional rule of grand jury secrecy," *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983), strongly suggests that, as a general matter, judicial hearings ancillary to grand jury proceedings traditionally were open to the public. Rule 6, as first adopted in 1944, did not contain any provision for closed judicial hearings, but instead explicitly limited the scope of grand jury secrecy to matters occurring inside the grand jury room.

It was not until more than 35 years after the initial adoption of Rule 6 that it was first suggested that the rule be amended to permit, in some circumstances, closure of such ancillary hearings, and that proposed amendment was explicitly acknowledged to be a *change* in traditional practice. In October 1980, the General Accounting Office ("GAO") issued a report titled *More Guidance And Supervision Needed Over Federal Grand Jury Proceedings* (the "GAO Report"). The GAO Report specifically considered the extent to which ancillary hearings (which the GAO Report referred to as "preindictment proceedings") were then open to the public, and found that a majority of trial judges that it interviewed either routinely conducted such hearings in open court or only closed such hearings on a case-by-case basis. GAO Report at 8-9.

In its June 27, 1980 response to a draft of the GAO Report, the Department of Justice expressed concern that the Report was advocating that all ancillary judicial hearings should be "conducted in secret." GAO Report, Appendix IV at 60. The Department's letter said that

such blanket closure would raise "serious constitutional questions," warning that "secret proceedings" can be "a menace to liberty" and emphasizing "the importance of open judicial proceedings to safeguard against courts being employed as instruments of persecution." *Id.* The letter also declared that while, from "a purely prosecutorial viewpoint, the Department would favor a rule that such proceedings should generally be closed," *id.* at 61, "we recognize and respect the common law rule of open judicial proceedings . . . and would be reluctant to support any rigid national requirement of closed judicial proceedings." *Id.* These statements on behalf of the nation's federal prosecutors—who presumably would have pointed out a tradition of closure of ancillary hearings if one had existed—are powerful proof that ancillary judicial hearings relating to grand jury matters were traditionally open and were not closed as a matter of course. In the end, the 1983 Amendment adding Rule 6(e)(5) rejected the notion of complete closure and instead authorized closure of hearings only "to the extent necessary to prevent disclosure of matters occurring before a grand jury."

The "evidence" relied upon by the court below in its attempt to demonstrate an historical *lack* of public access demonstrated no such thing. In support of its assertion that there is "no such tradition regarding ancillary proceedings relating to the grand jury," App., *infra*, at 13a-14a, the court quoted a passage from *Levine v. United States*, 362 U.S. 610, 615 (1960), in which this Court stated that "the courtroom had been properly, indeed, necessarily cleared." But that passage referred solely to a moment in the trial court's proceedings in which "the record of the morning's grand jury proceedings" were read to the court. *Levine*, 362 U.S. at 615. Petitioners have never contended that such revelations of "matters occurring before a grand jury" need be made

in an open courtroom. *Levine* simply lends no support for the proposition that ancillary proceedings, or portions thereof, at which "matters occurring before a grand jury" are *not* revealed historically have been closed.

The only other evidence of a tradition of closure offered by the court below was a number of very recent instances—all subsequent to the 1983 amendment to Rule 6(e)—in which district courts held sealed proceedings. App., *infra*, 14a n.9. Those cases give no indication of the traditional practice prior to that amendment. Indeed, the June 27, 1980 Department of Justice letter—which the court below failed even to mention—is far more instructive on this issue.

Had the First Amendment presumption been applied to the hearings below, then petitioners would have been entitled to prior notice of the hearings and an opportunity to argue against closure, and the district court would have been required to make specific findings on the record of a compelling interest justifying closure and to assure that any closure was narrowly tailored to serve that compelling interest. As the recently released transcript of the March 20 executive privilege hearing demonstrates, the hearing that the district court closed to the public contained very little, and readily segregable, secret grand jury materials, the hearing could easily have been open to the public without causing any serious disruption, and no compelling interest warranted closure of the hearing. The court of appeals' suggestion that recognition of a First Amendment right of access in this case would be "ridiculous" is unfounded, and contrary to this Court's precedents and the approach followed by other circuits. Both history and logic support recognition of a First Amendment presumption of access to judicial hearings ancillary to grand jury investigations.

Intervention by this Court is warranted to resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

June 3, 1998

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 8, 1998 Decided May 5, 1998

No. 98-3033

IN RE: MOTIONS OF DOW JONES & COMPANY, INC., ET AL.

Consolidated with
No. 98-3034

Appeals from the United States District Court
for the District of Columbia
(98ms00058)
(98ms00087)

Theodore J. Boutrous, Jr. argued the cause and filed the briefs for appellants.

W. Neil Eggleston argued the cause for appellee The White House. With him on the brief was *Charles F.C. Ruff*, Counsel to the President.

David E. Kendall argued the cause for appellee President William J. Clinton. With him on the brief was *Max Stier.*

Jamie S. Gardner argued the cause for appellee Francis D. Carter, Esq. With her on the brief was *Charles J. Ogletree, Jr.*

Nathaniel H. Speights argued the cause and filed the brief for appellee Monica Lewinsky.

Before: RANDOLPH, ROGERS, and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: On January 16, 1998, at the request of the Attorney General, a special division of this court issued an order expanding the prosecutorial jurisdiction of Independent Counsel Kenneth W. Starr.[1] The order—which the special division released to the public—authorized Starr to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law . . . in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*"; and "to investigate any person or entity who has engaged in unlawful conspiracy or who has aided or abetted any federal offense, as necessary to resolve" the first matter.

Thereafter, a grand jury here began receiving evidence about Monica Lewinsky and President Clinton, and others, or so appellants in this case tell us. Since mid-January the press has staked out the courthouse, photographing and attempting to intercept anyone who, because of his or her suspected status as witness or lawyer in the investigation, might shed light on the grand jury's progress. Some individuals have paused to give their versions of what transpired during their grand jury appearances; others have refused to be interviewed or to give a public statement.

The press, naturally desiring more information, moved for access to district court hearings and pleadings

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[1] Judges Sentelle, Butzner, and Fay sit on the Division for the Purpose of Appointing Independent Counsels.

related to the grand jury's investigation.[2] Under Rule 407(3) of the United States District Court for the District of Columbia, the Chief Judge shall "hear and determine all matters relating to proceedings before the grand jury." D.D.C.R. 407(3). Such "ancillary" matters may arise for a number of reasons. Grand juries summon witnesses and documents with subpoenas. Witnesses, including custodians of documents, report on the scheduled date not to a courtroom, but to a hallway outside the room where the grand jury is sitting. The witness must enter the grand jury room alone, without his or her lawyer. No judge presides and none is present. *See* SARA S. BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4.10, at 4-44 (2d ed. 1997). Inside the grand jury room are sixteen to twenty-three grand jurors, one or more prosecuting attorneys, and a court reporter. 18 U.S.C. § 3321; FED. R. CRIM. P. 6(a)(1), (d) & (e). The witness is sworn, and questioning commences, all to the end of determining whether "there is adequate basis for bringing a criminal charge." *United States v. Williams,* 504 U.S. 36, 51 (1992). Other than witnesses, each person present in the grand jury room or otherwise assisting the prosecutor is forbidden from disclosing "matters occurring before the grand jury," FED. R. CRIM. P. 6(e)(2) & (3)(A)(ii).

"Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length." *Williams,* 504 U.S. at 47. Still, at many points, from

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[2] Appellants are Dow Jones & Company, Inc.; the Los Angeles Times; ABC, Inc.; the Associated Press; Cable News Network, Inc.; CBS Broadcasting, Inc.; Fox News Network; National Broadcasting Company, Inc.; The New York Times Company; Time Inc.; USA Today; and The Washington Post.

service of the subpoena through the completion of the witness's grand jury appearance, judicial proceedings relating to the grand jury may take place. The judge may be called upon to decide a witness's motion to postpone the date of testimony or to quash the subpoena. If a witness refuses to answer questions on the basis of a testimonial privilege, such as attorney-client or husband-wife, the grand jury may seek a court order compelling the witness to answer. This may be done forthwith, through an oral presentation to the court, *see, e.g., Levine v. United States*, 362 U.S. 610, 612 (1960), or upon the filing of pleadings, followed by a hearing. A hearing will also be needed if a witness asserts his or her privilege against self-incrimination, and the prosecutor seeks an order from the court granting the witness immunity. *See* 18 U.S.C. § 6003(a).

These appeals are from the Chief Judge's denial of motions concerning two such ancillary proceedings and from her denial of a broader motion to govern access to all future ancillary proceedings stemming from the grand jury's investigation.[3] In chronological order, the press filed its first motion on March 5th, seeking "access to any and all proceedings and papers . . . as well as any

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[3] While no one has questioned our jurisdiction to hear these appeals, we have assured ourselves that appellate jurisdiction exists. *See* 28 U.S.C. § 1291; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1330 (D.C. Cir. 1985). We are also certain that although part of the case deals with the Chief Judge's refusal to allow the press to attend hearings now concluded, the capable-of-repetition-yet-evading-review doctrine saves the case from mootness. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 377-78 (1979); *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 6 (1986).

orders or rulings issued by the Court concerning assertions by Francis D. Carter of objections to the grand jury subpoena." The motion also requested "access to transcripts" of hearings to the extent they had "already occurred." (Carter, we are told, was an attorney for Monica Lewinsky.) Next, on March 9th, the press moved for the establishment of "procedures relating to public access to judicial proceedings and records in connection with the investigation being conducted by Independent Counsel Kenneth W. Starr." On March 11th, the press moved for "access to any hearings, and transcripts of such hearings . . . concerning the motion to show cause filed by President Clinton against Independent Counsel Kenneth W. Starr for alleged violations of grand jury secrecy."

We will take up first the motion requesting the Chief Judge to establish procedures governing public access to the hearings and to papers in all of the proceedings relating to the grand jury. Although the press framed its motion in terms of access to proceedings "to resolve privilege claims or other legal issues," it seems mainly interested in proceedings involving the assertions of testimonial privileges in response to grand jury subpoenas, and in President Clinton's motion for an order to show cause why the Office of the Independent Counsel should not be found in contempt. Among other things, the press requested the Chief Judge to provide advance public notice of hearings; to grant its counsel opportunity to be heard regarding closure; and to require "all motions, orders, and other judicial records filed in connection with the grand jury proceeding be docketed on the public record." The Chief Judge ruled that the press had neither a common law nor a First Amendment right of access and declined to adopt "movants' extraordinary procedures." The Chief Judge also found it "inappropriate and contrary to rule 6(e) to require any materials filed in connection with grand jury

proceedings to be docketed on the public record or unsealed without an express order from this Court. Even releasing the matters to be heard by the Court runs the risk of disclosing 'matters occurring before the grand jury.' FED. R. CRIM. P. 6(e)." The press maintains that the "blanket closure of judicial proceedings" and the failure to provide "procedural safeguards prior to closure" violate the First Amendment. *See* Brief for Appellants at 9.

A settled proposition, one the press does not contest, is this: there is no First Amendment right of access to grand jury proceedings. The Fifth Amendment makes the "Grand Jury" an essential element of the federal criminal justice system. A grand jury is a body that conducts its business in private. The Framers knew this as well as we do. "Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye." *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, 218 n.9 (1979); *see also United States v. Proctor & Gamble,* 356 U.S. 677, 681 (1958); *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 399 (1959).

The secrecy of grand jury proceedings is today preserved through FED. R. CRIM. P. 6(e). Grand jurors, prosecutors, stenographers and others are forbidden from disclosing "matters occurring before the grand jury."[4] This phrase—"matters occurring before the

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4 Rule 6(e)(2) General Rule of Secrecy.

> A grand jury, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph 3(A)(ii) of this subdivision shall not disclose matters

grand jury"—includes not only what has occurred and what is occurring, but also what is likely to occur. Encompassed within the rule of secrecy are "the identities of witnesses or jurors, the substance of testimony" as well as actual transcripts, "the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (en banc); *Fund for Constitutional Gov't v. National Archives & Records Serv.*, 656 F.2d 856, 869 (D.C. Cir. 1981).

With respect to ancillary judicial proceedings, "the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury." FED. R. CRIM. P. 6(e)(5).[5] Furthermore, "records, orders and subpoenas relating to grand jury proceedings shall remain under seal to the extent and for such time as necessary to prevent disclosure of matters occurring before a grand jury." FED. R. CRIM. P. 6(e)(6). The Advisory Committee believed that the rules did "not violate any constitutional right of the public or media to attend" such ancillary proceedings because no such constitutional right exists. FED. R. CRIM. P. 6(e)(5) advisory committee's note. The Supreme Court and Congress must have thought the

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> occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

[5] "Counsel or others allowed to be present at the closed hearing may be put under a protective order by the court." FED. R. CRIM. P. 6(e)(5) advisory committee's note.

same. *See* Supreme Court Order of April 28, 1983, authorizing the Chief Justice to transmit then-proposed Rules 6(e)(5) and 6(e)(6) to Congress.

In light of Rule 6(e), the constitutionality of which is not questioned, the press must take a narrow view of the purported First Amendment right of access. It cannot, and does not, claim a right to attend every minute of every hearing ancillary to the grand jury's investigation and it does not seek full disclosure of all pleadings and other papers filed in connection with such hearings. The press is not entitled, by the Constitution or by rule, to information about "matters occurring before the grand jury." But the press thinks the First Amendment entitles it to whatever else remains.

As to pleadings and papers, the press has no basis for complaint. A rule of the district court, not mentioned in the press's opening or reply brief, gives it the most it could expect from its constitutional claim. Local Rule 302 deals with motions, applications, and orders "filed in connection with a grand jury subpoena or other matter occurring before a grand jury."[6] "Papers, orders,

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[6] Local Rule 302 provides:

> A motion or application filed in connection with a grand jury subpoena or other matter occurring before a grand jury, all other papers filed in support of or in opposition to such a motion or application, and all orders entered by the Court in connection therewith, shall be filed under seal. Such a motion or application shall be assigned a Miscellaneous case number. All hearings on matters affecting a grand jury proceeding shall be closed, except for contempt proceedings in which the alleged contemnor requests a public hearing. Papers, orders and transcripts of hearings subject to this Rule, or portions thereof, may be made public by the Court on its own motion or on motion of any person upon a finding that

transcripts of hearings subject to this Rule, or portions thereof, may be made public by the Court on its own motion or on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." D.D.C.R. 302.[7] A portion of a transcript filed in these appeals and

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continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury.

[7] Other district courts similarly implement FED. R. CRIM. P. 6(e)(5) and (6). *See, e.g.*, C.D. CAL. R. 8.3 (proceedings involving applications for immunity, motions to quash subpoenas, and "other contested matters affecting grand jury proceedings prior to the indictment stage" shall be "closed to the public"); N.D. ILL. R. 1.04 ("all records . . . which relate to grand juries including grand jury subpoenas . . . docket of grand jury proceedings, motions and orders relating to grand jury subpoenas . . . shall be suppressed and released only on order of the Chief Judge"); S.D. IND. R. 10.1(c) ("All motions, orders, and other filings pertaining to matters before [the] grand jury shall . . . be maintained by the Clerk under seal, without necessity for a motion to seal or order"); D. MASS. R. 106.1(b) (all subpoenas, motions, pleadings, and other documents filed with the clerk concerning or contesting grand jury proceedings shall be sealed and impounded unless otherwise ordered by the court); E.D. MICH R. 6.1 ("a motion or application filed in connection with a grand jury subpoena or other matter occurring before a grand jury, all other papers filed in support of or in opposition to such a motion or application, and all orders entered by the Court in connection therewith, shall be filed under seal"); D. MONT. R. 105-4 ("grand jury matters, praecipes, subpoenas and returns will not be disclosed . . . without an order of court"); E.D. PA. R. 6.1(c)(4) ("all motions, affidavits or other papers relative to legal proceedings relating to grand jury investigations shall be automatically impounded, *i.e.*, filed under seal by the Clerk of the Court"); M.D. TENN. R. 6(b)(4) ("[a]ll matters pertaining to the grand jury . . . shall be placed and maintained under seal by the Clerk of the Court absent a specific order from

the representations of non-press counsel at oral argument convince us that the Chief Judge is implementing Rule 302 by redacting documents. It appears that any delay in the release of redacted documents is, at least in part, attributable to some of the attorneys who participated in the ancillary proceedings and who were ordered some time ago to prepare redacted copies for the Chief Judge's review. The Chief Judge's adherence to Rule 302 is also demonstrated by her order of February 24, 1998, granting the press's motion to unseal certain papers filed by President Clinton in connection with his motion for an order to show cause.

As to attendance at ancillary hearings, local Rule 302 states, "All hearings on matters affecting a grand jury proceeding shall be closed, except for contempt proceedings in which the alleged contemnor requests a public hearing." Rule 302 could be read as requiring the courtroom to be closed regardless of whether the hearing will reveal matters occurring before the grand jury. We seriously doubt that this reading is correct. Given Rule 6(e)(5)—ancillary proceedings shall "be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury"—local Rule 302 appears to mean only that, as an initial matter, all proceedings relating to the grand jury shall be closed, subject to an order opening the proceedings. On the

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a district judge to the contrary"); W.D. WASH. R. 6(h)(2) (clerk "shall accept for filing under seal without the need for further judicial authorization all motions and accompanying papers designated by counsel as related to Grand Jury matters"); E.D. WIS. R. 21.01 ("all subpoenas, motions, pleadings and other documents . . . concerning or contesting ongoing grand jury proceedings shall be treated as sealed documents").

limited record we have before us, we cannot be certain how the Chief Judge has interpreted the local rule. At any rate, the press has mounted no direct argument against the constitutionality of Rule 302; as we said before, its briefs do not even mention it. Whether, on the stricter reading, the rule would exceed the district court's authority to implement Rule 6(e)(5) is therefore an issue that has not been properly raised and one we do not decide. *See* FED. R. CRIM. P. 57(a)(1) (providing that district court rules "shall be consistent with" Acts of Congress and rules adopted pursuant to 28 U.S.C. § 2072).

As a matter of judicial administration, initially closing all ancillary proceedings makes good sense. If a hearing is about something "affecting" a grand jury investigation, there will nearly always be a danger of revealing grand jury matters.[8] Consider a challenge to a witness's claim of a testimonial privilege. The prosecutor appears before the Chief Judge seeking an order to compel testimony. The witness's identity, the fact that he was subpoenaed to testify, the fact that he invoked the privilege in response to questions, the nature of the questions asked—all these would be, according to our precedent, *SEC v. Dresser Industries, Inc.*, 628 F.2d at 1382, "matters occurring before the grand jury." To suppose that the First Amendment compels the court to conduct such hearings by placing the witness behind a screen and by emptying the

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[8] District court hearings on the motions filed by the press in this matter are of course an exception. These motions related to the grand jury but obviously revealed nothing about its workings. For that reason, we ordered the Chief Judge's orders denying the motions to be unsealed. We think it safe to say that ancillary hearings of this sort are not the focus of the press's First Amendment claim.

courtroom each time a grand jury matter reaches the tip of an attorney's or the judge's tongue is to suppose the ridiculous. We fully agree with Judge Becker, writing for the court in *United States v. Smith*, 123 F.3d 140, 153 (3d Cir. 1997), that "courts cannot conduct their business that way," nor should they be compelled to do so.

Of course, some ancillary proceedings might be conducted in such a way that there is no danger of grand jury matters being revealed. Rule 6(e)(5) binds the courts of appeals (and the Supreme Court) as well as the district courts. *See* FED. R. CRIM. P. 1 & 54(a). In cases on appeal from orders issued in ancillary proceedings, which we usually caption *"In re Sealed Case,"* we have sometimes taken portions of briefs and other papers under seal, and then held the oral argument in open court after assuring ourselves that no grand jury matter would be discussed. On other occasions, we have closed the courtroom for oral argument. In administering Rule 6(e)(5), appellate courts have a comparative advantage over district courts. We do not hear from witnesses. Oral arguments on appeal are always preceded by written arguments, usually filed well in advance. The briefs refine the legal points of contention and enable us to determine whether discussion of grand jury matters at oral argument will be needed. In the district court, ancillary proceedings generally proceed at a more rapid pace, the proceedings are typically not as structured, issues are not always as highly refined, witnesses may be present, and written presentations may be abbreviated. A proceeding in the district court to quash a subpoena, or to compel testimony, or to immunize a witness would, it seems to us, almost invariably reveal matters occurring before the grand jury, and thus may properly be closed to the public. In ancillary proceedings dealing with other subjects, however, it may be difficult to determine at the

outset whether grand jury matters might wind up being discussed. In all events, if the Chief Judge can allow some public access without risking disclosure of grand jury matters—either because the subject of the proceeding removes the danger or because the proceedings may be structured to prevent the risk without disruption or delay (*see United States v. R. Enterprises*, 498 U.S. 292, 298 (1991))—Rule 6(e)(5) contemplates that this shall be done. But it will be done because the Federal Rules of Criminal Procedure confer this authority on district courts, not because the First Amendment demands it.

Recognizing a First Amendment right to force ancillary proceedings to be conducted without referring to grand jury matters would create enormous practical problems in judicial administration, and there is no strong history or tradition in favor of doing so. The Supreme Court ruled in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), that the First Amendment did not entitle members of the media to attend a pretrial suppression hearing, at least so long as they could receive copies of the transcript at a later date after the danger of prejudice to the defendant had passed. The Court reached the opposite conclusion in *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 12, 13 (1986), holding that a "qualified First Amendment right of access attaches to preliminary hearings in California"—that is, probable cause hearings "sufficiently like a trial to justify" the conclusion that they should be open. One of the main differences between the two cases was that although the "near uniform practice of state and federal courts has been to conduct preliminary hearings in open court," *Press-Enterprise II*, 478 at 10; *see also id.* at 8, the Court in *Gannett* could identify no long-standing tradition of public access to pretrial suppression hearings. 443 U.S. at 384-93. There is likewise no such tradition regarding

ancillary proceedings relating to the grand jury. *See, e.g., Levine,* 360 U.S. at 615, stating with regard to such a proceeding, "the courtroom had been properly, indeed, necessarily cleared."[9] The press directs us to a 1980 report by the General Accounting Office—a report concerning the need to improve grand jury secrecy before the adoption of Rules 6(e)(5) and 6(e)(6)—as evidence that there is a "tradition of accessibility" to ancillary hearings. *See* Brief for Appellants at 17-19. The GAO Report, however, did not suggest that there

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[9] In this Circuit, proceedings concerning compliance with grand jury subpoenas and objections to subpoenas on the ground of privilege are sealed in the district court. *See Sealed v. Sealed,* No. 95-446 (D.D.C. filed Dec. 12, 1995), *rev'd and remanded, In re Sealed Case,* 124 F.3d 230 (D.C. Cir. 1997) (motion to quash on grounds of attorney-client and work-product privileges), *cert. granted sub nom. Swidler & Berlin v. United States,* 118 S. Ct. 1358 (1998); *Sealed v. Sealed,* No. 95-377 (D.D.C. filed Nov. 6, 1995), *rev'd and remanded, In re Sealed Case,* 107 F.3d 46 (D.C. Cir. 1997) (action to compel production of subpoenaed documents which were withheld on basis of attorney-client privilege and work product immunity). Other courts also routinely close hearings on motions to quash grand jury subpoenas. *See In re Grand Jury Proceedings,* 867 F.2d 539, 540 n.1 (9th Cir. 1988) ("All documents and briefs in this matter have been filed under seal to protect the secrecy of ongoing grand jury proceedings. The true names of appellant Doe and his former attorney Mary Roe are not revealed in this opinion."); *In re Two Grand Jury Subpoenae Duces Tecum,* 769 F.2d 52, 53 (2d Cir. 1985) ("Appellant is the custodian of records of a corporation whose name, along with the briefs and records in this case, remains under seal to protect the secrecy of the grand jury proceedings."); *In re Grand Jury Empanelled March 8, 1983,* 579 F. Supp. 189, 192 (E.D. Tenn. 1984) (ordering that hearings relating to motions to quash grand jury subpoenas be closed and "motions, responses to motions, and briefs which tend to reveal the substance of grand jury subpoenas" be sealed).

was any widespread or longstanding history of openness. Rather, GAO discovered a divergence of opinion among judges about whether "proceedings ancillary to the grand jury proceedings . . . should be open to the public." COMPTROLLER GENERAL, MORE GUIDANCE AND SUPERVISION NEEDED OVER FEDERAL GRAND JURY PROCEEDINGS 5 (1980). "Of the 15 judges we interviewed in 6 districts, 7 routinely hold preindictment proceedings in open court, 4 routinely close them, and 4 decide when to open or close them on a case-by-case basis." *Id.* at 8-9. We therefore agree with *Smith,* 123 F.3d at 149, that neither the press nor any member of the public has a First Amendment right to demand that the Chief Judge conduct open ancillary hearings in a way that would not reveal grand jury matters. *Accord In re Grand Jury Subpoena (John Doe No. 4),* 103 F.3d 234, 242 (2d Cir. 1996); *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records,* 864 F.2d 1559 (11th Cir. 1989).

The press also tells us that, at least with respect to disputes about executive privilege, there is a tradition of open proceedings. *See* Brief for Appellants at 11-14. Many of the instances identified, however, arose in response to congressional inquiries, or trial subpoenas, the most famous of which is *United States v. Nixon,* 418 U.S. 683 (1974). It is true that Chief Judge Sirica held an open hearing on President Nixon's very public refusal to comply with a grand jury subpoena duces tecum on the grounds of executive privilege. *See In re Grand Jury Subpoena,* 360 F. Supp. 1, 9 (D.D.C. 1973). But this example surely proves too much. Chief Judge Sirica's opinion, and we assume the transcript of the hearing itself, contains references to numerous "matters occurring before the grand jury" within Rule 6(e)'s meaning. *See, e.g., id.* at 3, 10, 11. Yet in this case the press concedes that the First Amendment confers no right of access to such matters. Furthermore, Chief

Judge Sirica conducted the hearing before adoption of Rule 6(e)(5). As against this example stands the most recent case we heard dealing with an assertion of executive privilege during a grand jury proceeding. In that case, the district court closed the hearing to the public and our opinion revealed no grand jury matter. *See Sealed v. Sealed*, No. 95-192 (D.D.C. filed June 7, 1995), *vacated and remanded, In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

There can be no doubt that assertions of executive privilege are rightly matters of intense public interest. But there have been too few examples of open ancillary hearings dealing with the privilege in the grand jury context to suggest any kind of trend, let alone an "unbroken, uncontradicted history." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980) (Burger, C.J.); *see also id.* at 565-68. There also can be no doubt of the value of public scrutiny of assertions of executive privilege. But as the Supreme Court emphasized in *Press-Enterprise II*, grand jury proceedings give rise to strong countervailing considerations. "[I]t takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. A classic example is that the 'proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'" 478 U.S. at 8-9 (quoting *Douglas Oil*, 441 U.S. at 218). The press in this case is not, in any event, barred from receiving non-protected details about what transpired before the court. The "denial of access," thus, is "not absolute but only temporary." *Gannett*, 443 U.S. at 393. Local Rule 302 provides that on the motion of "any person," or *sua sponte*, the court may make publicly available "portions" of "transcripts" of ancillary proceedings "upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the

grand jury." During oral argument, counsel for the White House informed us that the process of redacting transcripts of proceedings involving executive privilege was underway, pursuant to the Chief Judge's directive.

A problem remains. If the press is given no access to the fact that some sort of ancillary proceeding has taken place, or will take place, it may be unable to invoke Rule 302. In *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991), we held that there was a First Amendment right of access to plea agreements because these "have traditionally been open to the public and public access to them enhances both the basic fairness of the criminal proceeding and the appearance of fairness." *Id.* at 288. In light of this, we also held that trial courts must follow specific procedural prerequisites before granting a motion to seal. Included among these were an opportunity to be heard, specific findings on the record, and entry on the public docket. *Id.* at 289. Here, although we have found no such right of access under the Constitution, and hence no "procedural component" of the First Amendment violated by the Chief Judge's refusal to enter items under seal on the public docket, we have also recognized that local Rule 302 provides a limited means for disclosing non-secret matters. The rule requires that motions or applications filed in connection with matters occurring before a grand jury "shall be assigned a Miscellaneous case number." The press tells us that "all papers filed with the Clerk's office that have any relation at all to grand jury proceedings are filed under seal *and are not included in the public docket*," Brief for Appellants at 39. We can understand why a descriptive caption on a case might reveal grand jury matters, but we cannot understand why a designation such as "*In re Grand Jury Proceedings*," followed by a miscellaneous case number would have that consequence. The Chief Judge, in her memorandum opinion, did not explain why, in light of

Rule 302, there has been such a blanket sealing of the docket. As to this subject, we will therefore remand the case for reconsideration.

The press has also advanced what it calls a common law right of access to ancillary proceedings, a right resting on the Supreme Court's recognition of a common law right of access to "inspect and copy judicial records." *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978); *see also Washington Legal Found. v. United States Sentencing Comm'n*, 89 F.3d 897, 902 (D.C. Cir. 1996). The common law right, however, is not absolute. *See United States v. Hubbard*, 650 F.2d 293, 315 (D.C. Cir. 1980) (listing "time-honored exceptions") (quoting *Nixon*, 435 U.S. at 598). There is, for instance, no right of access to "documents which have traditionally been kept secret for important policy reasons." *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989); *see also United States v. Corbitt*, 879 F.2d 224, 228 n.2 (7th Cir. 1989); *In re Nat'l Broad. Co.*, 635 F.2d 945, 952 n.4 (2d Cir. 1980). Although some have identified a common law tradition of public access to criminal trials, this never extended to preindictment, pretrial proceedings involving a grand jury. *Gannett Co.*, 443 U.S. 368, indicates as much. In any event, even if there were once a common law right of access to materials of the sort at issue here, the common law has been supplanted by Rule 6(e)(5) and Rule 6(e)(6) of the Federal Rules of Criminal Procedure. These Rules, not the common law, now govern. *See In re Grand Jury Subpoena (John Doe No. 4)*, 103 F.3d 234, 237 (2d Cir. 1996).

Much of what we have already written relates to the press's motions regarding the two specific ancillary proceedings. In the first of these, the press sought access to proceedings, papers, orders, and rulings "concerning assertions by Francis D. Carter of

objections to the grand jury subpoena issued by the Independent Counsel." *See* Motion for Access to Proceedings Concerning Objections (filed Mar. 5, 1998). The Chief Judge, relying on FED. R. CRIM. P. 6(e)(5) and (6), found that "access to these matters poses a significant risk of disclosing information which has occurred or which may occur before the grand jury." We have held that "matters occurring before the grand jury" include "the identities of witnesses." *Fund for Constitutional Gov't*, 656 F.2d at 869; *see also In re Grand Jury Proceedings*, 914 F.2d 1372, 1374 (9th Cir. 1990) (noting that the government is not free to "publish lists of prospective or former grand jury witnesses"); *In re Grand Jury Investigation*, 610 F.2d 202, 216-17 (5th Cir. 1980) ("We construe the secrecy provisions of Rule 6(e) to apply not only to disclosures of events which have already occurred before the grand jury, such as a witness's testimony, but also to disclosures of matters which will occur, such as statements which reveal the identity of persons who will be called to testify."). The Chief Judge may have believed that to have granted even the press's motion for redacted versions of transcripts or other papers would have been to confirm the identity of a person the grand jury had subpoenaed. *Cf. Andresen v. Maryland*, 427 U.S. 463, 474 (1976) (noting that "the very act of production may constitute a compulsory authentication of incriminating information").[10] If the blanket denial of the motion rested on that ground, we do not believe it can be sustained. By the time of the Chief Judge's order it was no longer a secret that the grand jury had subpoenaed

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[10] The Chief Judge's order denying the motion mentioned Mr. Carter by name. We do not view this as confirming his status as someone called by the grand jury. The Chief Judge merely paraphrased the press's own submission.

Carter. Carter's attorney virtually proclaimed from the rooftops that his client had been subpoenaed to testify before the grand jury. *See, e.g., Lewinsky Ex-Lawyer Fights to Keep His Notes from Starr,* BOSTON GLOBE, Mar. 5, 1998, at A13; Toni Locy, *Ex-Intern's First Attorney Seeks to Have Subpoena Quashed,* WASH. POST, Mar. 5, 1998, at A14; *CBS Morning News* (CBS television broadcast, Mar. 5, 1998); *All Things Considered* (NPR radio broadcast, Mar. 4, 1998); David Willman & Robin Wright, *Ex-Lewinsky Lawyer Fights Starr Subpoena*, L.A. TIMES, Mar. 3, 1998, at A1; John Mintz, *Lewinsky's First Lawyer is Defended,* WASH. POST, Feb. 5, 1998, at A1. It is true that "Rule 6(e) does not create a type of secrecy which is waived once public disclosure occurs." *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994) (quoting *Barry v. United States*, 740 F. Supp. 888, 891 (D.D.C. 1990)). But it is also true that "when information is sufficiently widely known . . . it has lost its character as Rule 6(e) material." *Id.* Carter's identity as a person subpoenaed to appear before the grand jury has become such information, not because of press reports relying on unnamed sources, but because Carter's attorney decided to reveal this fact to the public. *Cf. United States v. R. Enterprises*, 498 U.S. at 294-96.

Still, the Chief Judge may have refused to provide redacted versions of the material requested by the press (as local Rule 302 contemplates) for reasons other than protecting the secrecy of Carter's identity. The particular items, documents, or testimony the grand jury seeks from Carter are not matters of public record, nor are Carter's specific grounds for resisting. Such "matters occurring before the grand jury" may have been woven tightly into the ancillary proceeding involving Carter, so tightly that the Chief Judge believed that none of the material could be released. In a similar situation, the special division of this court recognized

that sometimes "redaction is simply not possible." *In re North*, 16 F.3d at 1242. While this may have been the Chief Judge's reasoning, we cannot tell from the explanation given in her order. Our only recourse, therefore, is to vacate the order insofar as it denied the motion for redacted versions of the transcript and other papers and remand the case for reconsideration.

The final issue deals with the press's motion for public access to hearings and transcripts relating to President Clinton's motion to show cause. In response to an earlier press motion requesting unsealing, the Chief Judge conducted a Rule 302 analysis, stating: "After having reviewed the President's motion for order to show cause and the accompanying materials, the Court finds that continued sealing of that motion is not necessary to prevent disclosure of matters occurring before the grand jury." In ruling on the motion for access to hearings and transcripts, however, the Chief Judge found that "access to the transcripts poses a significant risk of disclosing information which has occurred or which may occur before the grand jury." The judge did not mention whether redacted transcripts might be made public, although Rule 302 states that the court may release "portions" of papers, orders, and transcripts of hearings. D.D.C.R. 302. The Chief Judge's silence on the subject stems from the press's failure to make it clear that it was requesting only redacted versions of the transcripts. The press proposed an order, but the order did not mention the possibility of redaction and it seems clear to us that the Chief Judge did not believe a motion for a redacted copy had been made. Thus, as matters now stand, the press has requested only an entire unredacted transcript of the proceedings. We have no reason to doubt the Chief Judge's judgment that releasing the entire transcript would threaten to reveal grand jury matters. The show cause motion itself concerns claims that the Independent

Counsel had been leaking grand jury material to the press. To decide such a motion one would naturally need to know whether any of the published reports actually mentioned matters that had occurred before the grand jury. If, however, the press clearly requests redacted versions of these transcripts in the future, we are confident that the Chief Judge would act on the motion consistent with the limits of Rule 6(e)(6) and local Rule 302.

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We remand for reconsideration the Chief Judge's order insofar as it denies the motion for entry of items on the public docket and vacate and remand the Chief Judge's order denying the motion for redacted papers, orders, and transcripts in the Carter proceeding. In all other respects, the orders are affirmed.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY INVESTIGATION	Misc. Action No. 98-058(NHJ)

UNDER SEAL

ORDER

Pending before the Court is the motion of Dow Jones & Company ("Dow Jones") for access to a motion and supporting materials filed on or about February 9, 1998. It has also moved to intervene in the matter to which it seeks access.

Dow Jones requests that certain materials filed under seal by David Kendall, acting as counsel for the President of the United States, be unsealed. Those materials seek an order to show cause against Independent Counsel Kenneth Starr for alleged violations of rules mandating grand jury secrecy. Mr. Kendall has openly made the allegations contained in that motion and indicated publicly that he would be filing such a motion. The Court has been informed by Mr. Kendall that his client takes no position on Dow Jones' motion for access. The Independent Counsel has filed a response stating that it does not oppose the motion to unseal.

President Clinton's motion was filed under seal pursuant to the Local Rules of this Court, which provide that "[a] motion or application filed in connection with a grand jury subpoena or other matter occurring before a grand jury . . . . shall be filed under seal." Local Rule 302. However, that Local Rule also states that pleadings subject to it may be made public by the Court "on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." *Id.*

After having reviewed the President's motion for order to show cause and the accompanying materials, the Court finds that continued sealing of that motion "is not necessary to prevent disclosure of matters occurring before the grand jury." *Id.* There is no material covered by Federal Rule of Criminal Procedure 6(e), the rule governing grand jury secrecy, that is contained in the motion; the motion contains only case law, argument, and information reported in the press.

The Court also recognizes the "strong presumption in favor of public access to judicial proceedings." *Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991); *see also Equal Opportunity Employment Commission v. National Children's Center, Inc.*, 98 F.3d 1406, 1408 (D.C. Cir. 1996). Anyone advocating sealing should be able to "come forward with specific reasons why the record, or any part thereof, should remain under seal." *Johnson*, 951 F.2d at 1278. No party has come forward with any such reasons and the Court finds that there is no necessity for the continued sealing of the President's motions and supporting material.

Accordingly, it is this 24th day of February 1998,

ORDERED that the motion of Dow Jones & Company to intervene and for access to motion and supporting materials filed on or about February 9, 1998, be, and hereby is, granted; it is further

ORDERED that the Clerk of the Court shall immediately unseal the motion of President William J. Clinton for order to show cause, the appendix to the motion to show cause, and the motion for protective order, as well as the accompanying memoranda and exhibits filed on February 9, 1998, under miscellaneous number 98-055; and it is further

ORDERED that, notwithstanding this Order, ALL OTHER FILINGS including future filings in miscellaneous number 98-055 SHALL BE FILED UNDER SEAL UNTIL FURTHER ORDER OF THIS COURT.

/s/
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY INVESTIGATION	Misc. Action No. 98-058(NHJ)

UNDER SEAL

ORDER

Rule 302 of the Local Rules of this Court provides that "[a] motion or application filed in connection with a grand jury subpoena or other matter occurring before a grand jury . . . shall be filed under seal . . . All hearings on matters affecting a grand jury proceeding shall be closed . . . ." Local Rule 302. Rule 6(e) of the Federal Rules of Criminal Procedure states that "the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury." Fed. R. Crim. P. 6(e)(5). Similarly, that Rule directs that "[r]ecords, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent necessary to prevent disclosure of matters occurring before a grand jury." Fed. R. Crim. P. 6(e)(6).

Pending before the Court is the motion of ABC, Inc., CBS Broadcasting, Inc., National Broadcasting Company, Inc., The New York Times Company and

The Washington Post to unseal court records and for access to proceedings. The motion requests access to certain papers believed to have been filed with this Court. No such papers exist. Movants' request must be denied because it is not ripe.

Movants also request that future proceedings involving any potential assertion of executive privilege or attorney-client privilege by employees or attorneys in the Executive Branch be open to the public. The Court holds that this request is premature. It is unable to find that continued sealing of a nonexistent matter is or is not "necessary to prevent disclosure of matters occurring before the grand jury." Local Rule 302.

Accordingly, it is this 27th day of February 1998,

ORDERED that the motion of ABC, Inc., CBS Broadcasting, Inc., National Broadcasting Company, Inc., The New York Times Company and The Washington Post to unseal court records and for access to proceedings be, and hereby is, denied.

/s/
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY INVESTIGATION	Misc. Action No. 98-058(NHJ)

UNDER SEAL

ORDER

Several news organizations[1] have filed a motion "for establishment of procedures relating to public access to judicial proceedings and records." The motion requests that certain procedures be followed so that the press may have notice of all upcoming hearings and an opportunity to argue for access. The Office of the Independent Counsel, which was served, takes no position on this motion.

Preliminarily, the Court notes that the news organizations have not established that they have standing to make these procedural requests of the Court, including receiving advance notice of any hearing

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[1] Dow Jones & Company, the Los Angeles Times, ABC, Inc., the Associated Press, Cable News Network, Inc., CBS Broadcasting, Inc., Fox News Network, National Broadcasting Company, The New York Times Co., Time Inc., USA Today, and the Washington Post.

pertaining to a grand jury matter. However, the Court will assume that they do have standing and will proceed to the merits of their request.

The Supreme Court has aptly stated: "The right to speak and publish does not carry with it the unrestrained right to gather information." Zemel v. Rusk, 381 U.S. 1, 17 (1965). The press is commonly excluded from many governmental processes, including grand jury proceedings. Branzburg v. Hayes, 408 U.S. 665, 684 (1972) ("Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations.").

It is evident that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979). Federal Rule of Criminal Procedure 6(e)(5) provides: "Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury." Similarly, Rule 6(e)(6) provides: "Records, orders and subpoenas relating to grand jury proceeding shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury."

The news organizations' argument for establishment of procedures relies upon cases that discuss access to judicial proceedings but do not control in the grand jury context. See Press-Enterprise Co. v.

Superior Court, 464 U.S. 501 (1984) (voir dire in a criminal trial); Johnson v. Greater Southeast Community Hospital Corp., 951 F.2d 1268 (D.C. Cir. 1991) (pleadings in a civil case); The Washington Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991) (criminal plea agreement); In re Washington Post Co., 807 F.2d 383 (4th Cir. 1986) (criminal plea and sentencing hearing).

Grand jury proceedings are fundamentally different from other criminal proceedings. Criminal proceedings have traditionally been open to the public in order to ensure the fairness of the proceedings. Richmond Newspapers, Inc. v. Virginia, 448 U.S., 555, 573 (1980); Press-Enterprise Co. v. Superior Court, 478 U.S. 1,7 (1986); In re Subpoena to Testify Before Grand Jury, 864 F.2d 1559, 1562 (11th Cir. 1989). However, grand jury matters are historically secret and the secrecy is essential to ensure the proper functioning of the grand jury. For those reasons, there is no common law right of access to grand jury materials. United States v. Smith, 123 F.3d 140, 156 (3d Cir. 1997).

The First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. Branzburg, 408 U.S. at 684. The First Amendment right to access also does not apply to grand jury proceedings. See e.g., Smith, 123 F.3d at 148; United States v. Corbitt, 879 F.2d 224, 237 n.15 (7th Cir. 1989). In so finding, courts have cited the traditional closure of the grand jury and the necessity for secrecy in conducting a grand jury investigation. Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 509-10 (lst Cir. 1989); In re Subpoena to Testify before Grand Jury, 864 F.2d at

1562-63. Other courts, including this Circuit, have denied media access to grand jury materials without even discussing the First Amendment. In re Donovan, 801 F.2d 409 (D.C. Cir. 1986); In re Petition to Inspect & Copy Grand Jury Materials, 576 F. Supp. 1275, 1289 (S.D. Fla. 1983), *aff'd*, 735 F.2d 1261 (11th Cir.), cert. denied sub. nom Hastings v. Investigative Committee, 469 U.S. 884 (1984).

Given that grand jury proceedings are presumptively secret, the Court declines to adopt movants' extraordinary procedures. Moreover, the Court finds it inappropriate and contrary to Rule 6(e) to require any materials filed in connection with any grand jury proceedings to be docketed on the public record or unsealed without an express order from this Court. Even releasing the matters to be heard by the Court runs the risk of disclosing "matters occurring before the grand jury." Fed. R. Crim. P. 6(e).

Accordingly, it is this 18th day of March, 1998,

ORDERED that the motion of the news organizations for establishment of procedures relating to public access to judicial proceedings and records be, and hereby is, denied.

/s/
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY INVESTIGATION	Misc. Action No. 98-058(NHJ)

UNDER SEAL

ORDER

Several news organizations[1] have filed a motion for public access to hearings and transcripts of hearings before the Court concerning the motion to show cause filed by President Clinton regarding alleged violations of grand jury secrecy. The Court has received no responses from the other parties to this proceeding regarding this motion.

Federal Rule of Criminal Procedure 6(e)(5) provides: "Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters

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[1] Dow Jones & Company, the Los Angeles Times, ABC, Inc., the Associated Press, Cable News Network, Inc., CBS Broadcasting, Inc., Fox News Network, National Broadcasting Company, The New York Times Co., Time Inc., USA Today, and the Washington Post.

occurring before a grand jury." Similarly, Rule 6(e)(6) provides: "Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury."

In the commentary to the 1983 amendments to Rule 6, which added Rule 6(e)(5), the Advisory Committee states that "certain hearings which would reveal matters which have previously occurred before a grand jury or are likely to occur before a grand jury with respect to a pending or ongoing investigation must be conducted in camera in whole or in part in order to prevent public disclosure of such secret information." The Court finds that access to the transcripts poses a significant risk of disclosing information which has occurred or which may occur before the grand jury. See In re Grand Jury Subpoena, 103 F.3d 234, 238 (2d Cir. 1996).

The news organizations do not possess either a common law right or a First Amendment right to access to these proceedings. See, e.g., United States v. Smith, 123 F.3d 140, 148, 156 (3d Cir. 1997); United States v. Corbitt, 879 F.2d 224, 237 n.15 (7th Cir. 1989); Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 509-10 (lst Cir. 1989). Rather, in order to justify lifting the secrecy that normally surrounds the grand jury proceedings, movants must make the strong showing of a "particularized need" for disclosure. United States v. Sells Engineering, Inc., 463 U.S. 418, 443 (1983). They have not done so in this instance and thus the Court must deny them access to the materials they seek.

Accordingly, it is this 18th day of March, 1998,

ORDERED that the motion of the news organizations for public access to hearings and transcripts relating to President Clinton's motion to show cause be, and hereby is, denied.

/s/
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY INVESTIGATION	Misc. Action No. 98-058(NHJ)

UNDER SEAL

ORDER

Several news organizations[1] have filed a motion for access to proceedings, transcripts, papers filed with the Court, and any orders of the Court concerning assertions of Francis D. Carter objecting to his grand jury subpoena. The Court has received no responses from the other parties to this proceeding regarding this motion.

Federal Rule of Criminal Procedure 6(e)(5) provides: "Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters

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[1] Dow Jones & Company, the Los Angeles Times, ABC, Inc., CBS Broadcasting, Inc., National Broadcasting Company, The New York Times Co., USA Today, and the Washington Post.

occurring before a grand jury." Similarly, Rule 6(e)(6) provides: "Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury."

In the commentary to the 1983 amendments to Rule 6, which added Rule 6(e)(5), the Advisory Committee states:

> [C]ertain hearings which would reveal matters which have previously occurred before a grand jury or are likely to occur before a grand jury with respect to a pending or ongoing investigation must be conducted in camera in whole or in part in order to prevent public disclosure of such secret information. . . . Two other kinds of hearings at which information about a particular grand jury investigation might need to be discussed are those at which the question is whether to grant a grand jury witness immunity or whether to order a grand jury witness to comply fully with the terms of the subpoena as directed to him.

The Court finds that access to these matters poses a significant risk of disclosing information which has occurred or which may occur before the grand jury. See In re Grand Jury Subpoena, 103 F.3d 234, 238 (2d Cir. 1996).

The news organizations do not possess either a common law right or a First Amendment right to access to these proceedings. See, e.g., United States v. Smith, 123 F.3d 140, 148, 156 (3d Cir. 1997); United States v.

Corbitt, 879 F.2d 224, 237 n.15 (7th Cir. 1989); Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 509-10 (lst Cir. 1989). Rather, in order to justify lifting the secrecy that normally surrounds the grand jury proceedings, movants must make the strong showing of a "particularized need" for disclosure. United States v. Sells Engineering, Inc., 463 U.S. 418, 443 (1983). They have not done so in this instance and thus the Court must deny them access to the materials they seek.

Accordingly, it is the 18th day of March, 1998,

ORDERED that the amended motion of the news organizations for access to proceedings concerning objections raised by Francis D. Carter be, and hereby is, denied.

/s/
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

RULE 6 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

(e) Recording and Disclosure of Proceedings.

* * * *

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

* * * *

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

LOCAL RULE 302 OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Rule 302. Grand jury matters.

A motion or application filed in connection with a grand jury subpoena or other matter occurring before a grand jury, all other papers filed in support of or in opposition to such a motion or application, and all orders entered by the Court in connection therewith, shall be filed under seal. Such a motion or application shall be assigned a Miscellaneous case number. All hearings on matters affecting a grand jury proceeding shall be closed, except for contempt proceedings in which the alleged contemnor requests a public hearing. Papers, orders and transcripts of hearings subject to this Rule, or portions thereof, may be made public by the Court on its own motion or on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:

SEALED PROCEEDING

Washington, D.C.
March 20, 1998
2:00 p.m.

BEFORE THE HONORABLE NORMA HOLLOWAY JOHNSON
CHIEF JUDGE, UNITED STATES DISTRICT COURT

[Unsealed Portion Of Transcript Of Hearing]

THE COURT: One of the witnesses—

MR. TREANOR: Yes, ma'am.

THE COURT: —of concern in this motion. All right.

MR. TREANOR: That's right.

THE COURT: And Mr. McDaniel?

MR. McDANIEL: Yes, Your Honor.

THE COURT: You are here for—

MR. McDANIEL: Sidney Blumenthal.

THE COURT: The witness, Mr. Blumenthal.

MR. McDANIEL: Yes.

THE COURT: All right. And who represents the other witness?

MR. MURPHY: Your Honor, William Murphy, for Mr. Lindsey.

THE COURT: For Mr. Lindsey? All right. So I guess with the exception of counsel who are with named counsel, I have everyone's name; is that correct? All right. I recognize White House counsel by now.

Counsel, I'd like to begin by stating that I have received the motion of the Office of Independent Counsel to unseal today's hearing and the pleadings filed for this hearing. I have decided that the public will not have access to this hearing because it would be too

disruptive to stop the hearing and clear the courtroom every time that Rule 6(e) material is to be mentioned. I also must note that the pleading that I received just last evening from the White House, in my view, has not been redacted. I'm not certain of that, but that's my opinion.

I will, however, release a redacted transcript after receiving the parties' suggestions on what should be redacted. I also reserve judgment on releasing redacted pleadings until I receive proposed redacted pleadings from the White House and from the personal attorneys for the President. I will give the parties an opportunity to object to all proposed redacted pleadings before I release them.

Now, if anyone wishes to address what I have decided I am going to do, just to be on the record, you may do so now.

MR. HEATON: Your Honor, I just want to make one point. Obviously, we feel this is a matter of great public interest. And while we have no problem with your approach, we would ask that arrangements be made for the transcript to be prepared as quickly as possible so that the public can obtain access to matters that are of such great interest.

THE COURT: Well, we always attempt to do that.

MR. HEATON: All right.

MR. EGGLESTON: Your Honor, let me just say that we do not object to the procedures you have

outlined and think that they are an appropriate resolution of this matter.

THE COURT: Thank you. Anyone else? Well, I'll move on, then, to the next issue.

Supreme Court, U.S.
FILED
JUL 6 1998
OFFICE OF THE CLERK

(2)

No. 97-1959

In the Supreme Court of the United States

OCTOBER TERM, 1997

DOW JONES & COMPANY, ET AL., PETITIONERS,

v.

PRESIDENT WILLIAM JEFFERSON CLINTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT THE WHITE HOUSE IN OPPOSITION

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The White House

30 pp

QUESTION PRESENTED

Whether a federal court may, when it finds that contemporaneous public attendance at a grand jury ancillary proceeding would disrupt its procedures and risk disclosure of grand jury matter, conduct a closed hearing but release redacted briefs and transcripts afterwards.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1959

DOW JONES & COMPANY, ET AL., PETITIONERS,

v.

PRESIDENT WILLIAM JEFFERSON CLINTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT THE WHITE HOUSE IN OPPOSITION

The Office of the President of the United States ("White House"), Respondent in the above-captioned matter, respectfully opposes the Petition for a Writ of Certiorari. The dispute between the courts of appeals outlined in the Petition turns out, upon closer examination, not to exist. The other courts of appeals stand in broad agreement with the decision the court of appeals reached in this case—a decision entirely harmonious with this Court's precedents and with the Constitution.

We emphasize at the outset the limited extent of the White House's interest in the instant litigation. As it did in the court of appeals, the White House takes no position on

the district court's closure of litigation relating to privileges held by *individuals*, whether or not those individuals are also government employees. The White House's only concern here is the degree of public access that is proper to litigation over testimonial privileges held by government officers acting as such.

STATEMENT OF THE CASE

In early 1998, the Office of Independent Counsel ("OIC") filed, in the U.S. District Court for the District of Columbia, three motions to compel senior presidential advisors to testify before a grand jury. The motions were properly filed under seal pursuant to Fed. R. Crim. P. 6(e)(6) and D.D.C. R. 302,[1] and were maintained under seal by the district court. The OIC's motions sought, inter alia, to compel the witnesses to disclose communications that the White House asserted were covered by the presidential communications privilege, the attorney-client privilege, and the attorney work product doctrine. *See* White House Br. in Opp., *United States* v. *Clinton*, No. 97-1924, at 2–3. The district court fixed a briefing schedule on the motions to compel, and heard argument on the factual and legal issues on March 20 and March 24, 1998.[2]

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[1] The pertinent text of these provisions is reproduced in Petitioner's Appendix ("Pet. App.") at 38a–39a.

[2] The March 20, 1998 hearing chiefly involved the assertions of official privileges, and a redacted transcript of that hearing has been released to the public. The March 24, 1998 hearing chiefly involved matters other than the assertions of official privileges, and that proceeding has been preserved under seal. The district court has also released portions of the arguments of counsel on February 18 and 19, 1998, to the extent they related to official privilege issues and did not reveal grand jury matters.

Although fully cognizant of the several motions previously filed by the media organizations requesting public access to sealed proceedings, the district court found as a fact that contemporaneous public attendance would disrupt its proceedings. The court found that the issues before it necessarily involved what transpired before the grand jury, and discussions of the legal issues could not readily be separated from discussions of sealed grand jury material. (Pet. App. 41a–42a). The district court found that "it would be too disruptive to stop the hearing and clear the courtroom every time that Rule 6(e) material is to be mentioned." (*Id.*). In concluding that the hearing on the OIC's motions to compel should not be open to the public because of the unavoidable need to discuss grand jury matters, the district court acted well within its authority under Fed. R. Crim. P. 6(e)(5), requiring that any "hearing on matters affecting a grand jury proceeding . . . be closed to the extent necessary" to preserve grand jury secrecy. See also D.D.C. R. 302.

Recognizing and accommodating the public interest in its proceedings, however, the district court ordered the parties to submit proposed redactions to their pleadings and the hearing transcript. The parties did so, and the district court released redacted copies of the pleadings and transcript to the public.

On the media organizations' appeal, the court of appeals upheld the district court's finding that it would unduly disrupt the proceedings if the courtroom had to be cleared every time grand jury matters came up for discussion. It is worthwhile to restate the court of appeals' analysis in pertinent part:

> As a matter of judicial administration, initially closing all ancillary proceedings makes good sense. If a hearing is about something "affecting" a grand jury investigation, there will nearly al-

> ways be a danger of revealing grand jury matters. Consider a challenge to a witness's claim of testimonial privilege. The prosecutor appears before the Chief Judge seeking an order to compel testimony. The witness's identity, the fact that he was subpoenaed to testify, the fact that he invoked the privilege in response to questions, the nature of the questions asked—all these would be, according to our precedent, . . . "matters occurring before the grand jury." To suppose that the First Amendment compels the court to conduct such hearings by placing the witness behind a screen and by emptying the courtroom each time a grand jury matter reaches the tip of an attorney's or the judge's tongue is to suppose the ridiculous. We fully agree . . . that "courts cannot conduct their business that way," nor should they be compelled to do so.

(Pet. App. 11a–12a (citations omitted)).[3]

The court of appeals proceeded to apply to Petitioners' request the two-part "experience" and "logic" test this Court set forth in *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) (*"Press-Enterprise II"*). (Pet. App. 13a). As to the "experience" test, the court of appeals noted that grand jury proceedings themselves (which Petitioners correctly point out are not directly at issue here) were secret by law and not

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[3] As the quoted passage makes clear, the court of appeals simply did not, as Petitioners would have it, "f[i]nd it 'ridiculous' even to suggest that the First Amendment might give the public a right to ask" for admittance to a sealed hearing. (Pet. 8–9). What the court of appeals found "ridiculous" was a revolving-door hearing in which scores of journalists would have been repeatedly shuffled in and out of the courtroom as Rule 6(e) matters came up for discussion.

subject to a tradition of media access. (Pet. App. 6a–7a). Accord *Douglas Oil Co.* v. *Petrol Stops N.W.*, 441 U.S. 211, 218 & n.9 (1979) ("[w]e consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings"; "[s]ince the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye").

The court of appeals found "too few examples of open ancillary hearings . . . in the grand jury context" (Pet. App. 16a) to support a colorable First Amendment claim, and found that "grand jury proceedings give rise to strong countervailing considerations" (*ibid.*) that support closing grand jury ancillary proceedings, at least initially. It recommended that the district court consider establishing a public docket (Pet. App. 17a–18a), vacated the district court's ruling regarding certain other transcripts that do not concern the White House (*id.* at 18a–20a), and in all other respects affirmed the district court (*id.* at 22a).

Significantly, at no time have Petitioners been completely deprived of information about the proceedings below. When proceedings before the courts below involved purely legal issues as to which there was no risk of disclosing grand jury matter, those courts unerringly opened their proceedings to the public to the maximum extent possible. Thus, for example, the argument in the court of appeals on Petitioners' requests for access was held in open court. See Neil A. Lewis, *Press Appeals for Access to Grand Jury on Clinton*, N.Y. TIMES, Apr. 9, 1998, at A20. The recent arguments before the court of appeals concerning the attorney-client privilege of a governmental client were also open, although the court of appeals held a separate sealed proceeding for the consideration of issues other than governmental privileges. See Ste-

phen Labaton, *Lewinsky Case and 'Privilege' Fought in Court*, N.Y. TIMES, June 30, 1998, at A1, A16.[4]

REASONS FOR DENYING THE WRIT

I.
THE COURTS OF APPEALS ARE NOT IN DISAGREEMENT

The decision of the court of appeals in this case was correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is not warranted.

The Petition contends that the courts of appeals disagree over the meaning and application of the "experience" part of the two-part test this Court set forth in *Press-Enterprise II*. On one side of the dispute, Petitioners say, stand the courts of appeals for the Fourth and Fifth Circuits, which "treat[] the 'experience' factor as an essential prerequisite," as Petitioners believe the court of appeals did in this case. Pet. 17 (citing *Baltimore Sun Co.* v. *Goetz*, 886 F.2d 60, 64–65 (4th Cir. 1989), and *Calder* v. *IRS*, 890 F.2d 781, 783–784 (5th Cir. 1989)). On the other side, Petitioners place "the Second, Third and Ninth Circuits" (Pet. 15), which allegedly have

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[4] Similarly, as had the district court before it, the court of appeals ordered the parties to produce redacted versions of their briefs, which were released on June 25, 1998, four days before the oral argument. In the briefing before this Court on the OIC's petition for a writ of certiorari before judgment in the Court of Appeals (*United States* v. *Clinton*, No. 97-1924), the White House submitted a brief that was open to the public in its entirety, and the OIC prepared public versions of its briefs from which grand jury materials had been redacted. A tremendous quantity of accurate information about both sides' legal positions has been made available to the public in a timely fashion.

"concluded that the 'experience' factor is *not* a necessary prerequisite." Pet. 16 (citing *United States* v. *Suarez*, 880 F.2d 626, 631 (2d Cir. 1989), *United States* v. *Simone*, 14 F.2d 833, 837–840 (3d Cir. 1994), and *Seattle Times Co.* v. *United States District Court*, 845 F.2d 1513, 1517 (9th Cir. 1988)).

An examination of those precedents, however, shows that they addressed media access issues in contexts quite different from the one presented to the courts below. Petitioners' cases show, not that the courts of appeals have interpreted *Press-Enterprise II* differently, but only that the result of the settled two-part test may differ depending on the facts to which it is applied. The fact that courts of appeals confronted with diverse factual and legal situations have reached diverse results shows proper application, not misinterpretation, of *Press-Enterprise II*.

What is more, case law from the Second, Third, and Ninth Circuits confirms that, when presented with the same question as the court of appeals in this case, those courts agree with courts below that no First Amendment right of access attaches to ancillary proceedings that may reveal grand jury matters. These precedents confirm that no disagreement exists among the courts of appeals that would warrant this Court's review on certiorari.

A. The Ancillary Proceedings At Issue Here Involved Grand Jury Matters Protected By Rule 6(e)

The district court correctly perceived that discussions of grand jury witnesses' assertions of privilege would necessarily require some discussion of matters occurring before the grand jury—matters Rule 6(e) requires to remain confidential. (See Pet. App. 41a–42a). The court of appeals agreed, ruling that "[t]he witness's identity, the fact that he was sub-

poenaed to testify, the fact that he invoked the privilege in response to questions, the nature of the questions asked"—all of which would arise during any proceedings on a challenged claim of testimonial privilege—would lie within Rule 6(e)'s strict requirement of secrecy. (Pet. App. 11a).

Petitioners do not—and cannot—challenge this conclusion, on which both the district court and the court of appeals agreed. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."); accord *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 840–841 (1996); *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967). Accordingly, for purposes of assessing the arguments in the Petition, it has been established conclusively that the hearings to which Petitioners sought access necessarily involved matters the law required to remain confidential.

B. The Second, Third, And Ninth Circuit Cases On Which Petitioners Rely Did Not Involve Historically Closed Proceedings

None of the cases on which Petitioners rely to demonstrate a circuit split involved grand jury ancillary proceedings, and those cases are simply inapposite to the question before the courts below. Contrary to Petitioners' assertion, the Second, Third, and Ninth Circuits have not "concluded that the 'experience' factor is *not* a necessary prerequisite" (Pet. 16) when evaluating media requests for access under *Press-Enterprise II*. All three of Petitioners' cases are distinguishable, because they involved novel types of judicial pro-

ceedings for which no history relevant to the "experience" test existed.

The Second Circuit addressed whether the First Amendment provided a presumptive right of access to CJA vouchers, which document the payment of expenses for court-appointed defense experts in a criminal trial. See *Suarez*, 880 F.2d at 628. The case said nothing about the right of access in *pretrial* proceedings such as grand jury investigations or proceedings ancillary thereto.

In evaluating the "experience" test of *Press-Enterprise II*, the court of appeals did not hold that the test was unnecessary, but instead concluded that the novelty of the proceeding at issue—the CJA expense voucher process—deprived it of any data from which it could reach a conclusion one way or the other on historical openness. See *Suarez*, 880 F.2d at 631. Finding that "experience" counseled neither openness nor closure, the court of appeals presumed a right of public access. *Ibid.*

The Third Circuit case on which Petitioners rely involved a post-trial inquiry into juror misconduct. Here, too, the historical record was essentially silent on the question of public access to such proceedings. The court, expressly applying both the "experience" and "logic" tests of *Press-Enterprise II*, searched in vain for "cases . . . in support of either openness or closure for this type of post-trial proceeding." *Simone*, 14 F.3d at 838. The government cited several cases, but the court of appeals found them to be "of such recent vintage they do not establish a tradition of closure." *Ibid.* Finding no history one way or the other, the court concluded that "on the whole, the 'experience' prong of the 'logic and experience' test provides little guidance in this case." *Ibid.* Although it found the available precedents unilluminating on

the "experience" test, the court never, contrary to Petitioners' portrayal, found "experience" to be an irrelevant or unnecessary consideration.

Petitioners' Ninth Circuit case presented another situation in which the novelty of the proceeding deprived the court of historical evidence relevant to the "experience" test. Although bail proceedings, which were at issue in that case, were not themselves innovative, recent statutory reforms had greatly changed the significance of the proceedings and the procedures employed. See *Seattle Times*, 845 F.2d at 1516. Confronted with what was, in effect, a new type of proceeding, the court found that "the historical tradition surrounding bail proceedings is much less significant" when considering a right of access. *Ibid.* Once again, the court of appeals never found the "experience" test unnecessary or irrelevant; it only found the historical record inconclusive.

Thus understood, none of the cases on which Petitioners rely are relevant here, for in none of them did the courts address "proceedings [that] have been closed to the public" "[s]ince the 17th century." *Douglas Oil*, 441 U.S. at 218 n.9. A court may find no relevant evidence of "experience" when dealing with a new type of proceeding, but that in no way undercuts the courts' consistent recognition that, when a historical tradition of open or closed proceedings exists, it must be preserved under *Press-Enterprise II*.

C. The Second, Third, And Ninth Circuits Agree With The Courts Below In The Circumstances Here

When confronted with factual situations analogous to the grand jury ancillary proceedings at issue here, the Second, Third, and Ninth Circuits have agreed with the courts below that the "experience" test of *Press-Enterprise II* applies and

is not met. The uniform recognition among the courts of appeals that proceedings that may reveal grand jury matter should remain closed belies Petitioners' assertion that the Second, Third, and Ninth Circuits misunderstand the "experience" test or apply it differently from the courts below.

In *In re Grand Jury Subpoena*, 103 F.3d 234 (2d Cir. 1996), members of the media sought access to a district court hearing on a grand jury witness's claim of unlawful electronic surveillance. *Id.* at 236. The Second Circuit found that the hearing on the witness's claim would "pose[] a significant risk of disclosing information which has occurred or which may occur before the grand jury." *Id.* at 238. Although the court, expressly applying both parts of the *Press-Enterprise II* test, *id.* at 242, believed it "possible" that a presumptive, qualified right of access could attach, it was "overcome in the grand jury context by the overriding interest in secrecy." *Ibid.*

Similarly, the court of appeals in *United States* v. *Smith*, 123 F.3d 140 (3d Cir. 1997), refused to grant media organizations access to a proceeding concerning whether a prosecutor had improperly disclosed Rule 6(e) material. The court of appeals "conclude[d] that grand jury secrets might be disclosed by the briefs and hearing to which the newspapers seek access[.]" *Id.* at 143. The court considered the "experience" test of *Press-Enterprise II* at length. See *id.* at 146–151. Because "the briefs and hearing will necessarily reveal grand jury material," the court of appeals found "that the briefs and hearing to which the newspapers seek access are afforded secrecy under Fed. R. Crim. P. 6(e)(5) and 6(e)(6) . . . . As such, there is no presumptive First Amendment right of access thereto." *Id.* at 151. This holding rested primarily, and explicitly, on the history of confidentiality of grand jury and ancillary proceedings, a history the court was required to

consider under the "experience" test of *Press-Enterprise II*. See, *e.g.*, *id.* at 148 ("[h]istorically, such proceedings have been closed to the public").

Finally, in *Times Mirror Co.* v. *United States*, 873 F.2d 1210 (9th Cir. 1989), the court of appeals addressed whether the First Amendment provided a presumptive right of access to a pre-indictment FBI search warrant and accompanying affidavit. Discussing the "experience" test in some detail, the court analogized the pre-indictment investigation to "grand jury proceedings," which "[t]raditionally . . . have been kept secret even though they are judicial proceedings which are closely related to the criminal fact-finding process." *Id.* at 1213. Reviewing the media organizations' request for access, the court of appeals found "no historical tradition of open search warrant proceedings and materials." *Id.* at 1214. Accordingly, the court held that "[h]istorical experience . . . furnishes no support for the claimed right of access to warrant proceedings[.]" *Ibid.*

The lessons of these cases are clear and may be simply stated: circumstances matter. Where a long historical tradition of confidentiality exists, as with grand jury proceedings, the "experience" test of *Press-Enterprise II* weighs heavily against any First Amendment right of access. Where proceedings share a long history of openness, as with criminal trials[5] or voir dire proceedings,[6] the "experience" test supports a presumptive First Amendment right of access. Where *no* tradition exists one way or the other, as in the case of proceedings too novel for such a tradition to have developed, the

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[5] See, *e.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980).

[6] See, *e.g.*, *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984).

"experience" test has no work to do, and the inquiry naturally will turn more on the "logic" test of *Press-Enterprise II*. Different conclusions may result in different factual contexts, but this says nothing about the validity and proper application of *Press-Enterprise II*, and creates no disagreement among the Circuits warranting this Court's intervention.

II.
PRUDENTIAL CONSIDERATIONS WEIGH AGAINST THIS COURT'S DISCRETIONARY REVIEW

Even if a bona fide disagreement among the Circuits existed, and it does not, several factors make this case a poor candidate for discretionary review on certiorari.

First, it is far from clear that the issues the Petition attempts to raise are squarely presented here. The court of appeals ruled that, insofar as the Petitioners sought "pleadings and papers," the district court's Local Rule 302 "gives [the press] the most it could expect from its constitutional claim." (Pet. App. 8a). That rule expressly requires pleadings in grand jury ancillary matters to be filed and maintained under seal, and specifies that "[a]ll hearings on matters affecting a grand jury proceeding shall be closed[.]" (Pet. App. 39a). Petitioners did not challenge the constitutionality of Local Rule 302, or of Fed. R. Crim. P. 6(e), in the court of appeals (Pet. App. 8a), and they expressly disavow any intent to raise such a claim for the first time before this Court. (Pet. 9 n.6). But those rules, unless they are unconstitutional, appear to resolve this dispute conclusively against Petitioners. This Court ordinarily would decline to consider an abstract question of constitutional law, such as the Petition presents, while pretermitting consideration of the statutes and rules that may

supply independent grounds for decision. See *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Conservation of the Court's adjudicative resources counsels deferring consideration of the issues Petitioners attempt to raise until a case squarely presenting them arises.

Second, the Petition does not challenge the shared conclusion of both courts below (Pet. App. 11a–13a, 41a–42a) that public attendance at the hearings would be disruptive. See *Graver*, 336 U.S. at 275. Requiring the district court to clear the courtroom every time Rule 6(e) matters came up for discussion would result in a disjointed, unfocused proceeding that would hamper the court's consideration of the important issues before it, while not meaningfully advancing the public interest in access to non-sealed proceedings. See *Smith*, 123 F.3d at 152–154. It is impossible to conclude that the courts below erred in granting Petitioners full access to redacted pleadings and transcripts, while denying them only the right to attend the district court's hearings contemporaneously.[7]

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[7] The court of appeals noted that its own proceedings differed from those before the district court, because the issues presented to it had been distilled in advance to present purely legal, rather than factual questions, making it better able than the district court to determine in advance of the hearing whether discussion of grand jury matters would be required. (Pet. App. 12a). Thus, there is no inconsistency in the court of appeals holding open argument on subjects the district court found necessary to maintain under seal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-1959

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DOW JONES & COMPANY, INC., THE *LOS ANGELES TIMES*, ABC, INC., THE ASSOCIATED PRESS, CABLE NEWS NETWORK, INC., CBS BROADCASTING INC., FOX NEWS NETWORK, NATIONAL BROADCASTING COMPANY, INC., THE NEW YORK TIMES COMPANY, TIME INC., *USA TODAY*, AND *THE WASHINGTON POST*,

Petitioners,

v.

PRESIDENT WILLIAM JEFFERSON CLINTON, THE WHITE HOUSE, INDEPENDENT COUNSEL KENNETH W. STARR, MONICA LEWINSKY, AND FRANCIS D. CARTER,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners Dow Jones & Company, Inc., the *Los Angeles Times*, ABC, Inc., The Associated Press, Cable News Network, Inc., CBS Broadcasting Inc., Fox News Network, National Broadcasting Company, Inc., The New York Times Company, Time Inc., *USA Today*, and *The Washington Post* respectfully submit this reply brief in support of their petition for a writ of certiorari, and in response to the Brief For Respondent The White House In Opposition (the "White House Opp.").

DISCUSSION

This case squarely presents the question whether closure of judicial hearings ancillary to grand jury proceedings, including hearings relating to the Independent Counsel's investigation of the President, violates the public's First Amendment rights. The proper resolution of this question is fundamental to the ability of the press to report to the public in a timely manner on matters of utmost concern during the midst of a national controversy over criminal allegations relating to the President. As the White House's opposition makes abundantly clear, deep division exists among the lower courts concerning the proper test for determining when the First Amendment presumption of access applies to particular judicial proceedings. The Court should grant the petition to resolve the conflict regarding this important and recurring issue, and to ensure that the public's rights of access are not unconstitutionally restricted in this case, where an Independent Counsel, acting on behalf of the United States, is deploying his extraordinary powers to investigate the Chief Executive of the United States.

I. The Circuits Are In Disagreement, As Amply Demonstrated By The White House's Opposition

The White House argues that the circuit courts are not in disagreement concerning whether the "experience" factor is an absolute prerequisite. White House Opp. at 8-10. But the White House's analysis of the relevant Second, Third and Ninth Circuit cases is essentially identical to the analysis of those cases presented in the Petition, and amply demonstrates that a disagreement *does* exist.

The White House argues that *United States v. Suarez*, 880 F.2d 626 (2d Cir. 1989), *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994), and *Seattle Times Co. v. United States District Court*, 845 F.2d 1513 (9th Cir. 1988), are not inconsistent with the ruling below of the D.C. Circuit, but instead are "distinguishable" on grounds that "they involved novel types of judicial proceedings for which no history relevant to the 'experience' test existed." White House Opp. at 8-9. But the White House concedes that in all three of those cases, the courts of appeals found a First Amendment right of access, even though there was "no relevant evidence of 'experience.'" *Id.* at 10. Thus, the White House *agrees* with Petitioners' basic point: that the Second, Third and Ninth Circuits do not interpret the "experience" factor as a necessary prerequisite to finding that the First Amendment presumption applies to a particular type of judicial proceeding.

And the White House also agrees, as it must, that it was a perceived lack of sufficient evidence of "experience" that led the D.C. Circuit to conclude that no First Amendment right of access applied to the ancillary hearings at issue. In describing the D.C. Circuit's ruling on the First Amendment issue, the White House

states that "[t]he court of appeals found 'too few examples of open ancillary hearings . . . in the grand jury context' to support a colorable First Amendment claim." White House Opp. at 5. Assuming *arguendo* that the D.C. Circuit was correct about the lack of evidence of open ancillary hearings, that lack of evidence simply would have placed the ancillary hearings into the category described by the White House as "novel types of judicial proceedings for which no history relevant to the 'experience' test existed." *Id.* at 8-9. Thus, had the D.C. Circuit applied the analysis of the Second, Third and Ninth Circuits (even as described by the White House), it would then have gone on to analyze the "logic" factor. Analysis of the "logic" factor would heavily have favored recognition of a First Amendment qualified right of access, as acknowledged by the D.C. Circuit. *See* Pet. App. 16a.

Accordingly, the White House's analysis of the decision below, and of the relevant Second, Third and Ninth Circuit decisions, is entirely consistent with the analysis presented in the Petition. It amply demonstrates the existing disagreement among the courts of appeals concerning whether satisfaction of the "experience" factor is a necessary prerequisite to recognition of a First Amendment right of access.

The White House does not disagree that the D.C. Circuit's interpretation of the "experience" factor as requiring an "'unbroken, uncontradicted history'" of public access, Pet. App. 16a, is inconsistent with decisions of this Court and of other courts of appeals. *See* Pet. at 18-20. Nor does the White House disagree that there in fact exists a strong history, dating back at least to the 1807 Aaron Burr proceedings, of open judicial hearings on matters ancillary to ongoing grand jury investigations. *See id.* at 22-29. And neither the White House

nor the court below was able to demonstrate a history of *closure* of such judicial proceedings.

In short, the D.C. Circuit's ruling below is inconsistent with the decisions of other courts both with respect to whether satisfaction of the "experience" factor is a necessary prerequisite to recognition of a First Amendment presumption of access, and with respect to the type or quantum of historical evidence necessary to satisfy that factor. Clarification by this Court of the meaning and application of the "experience" factor is necessary to resolve these disagreements among the lower courts, and to provide for consistent and proper adjudications of the public's rights of access to judicial proceedings in the future.

II. Application Of The Proper First Amendment Standards By The District Court Would Have Had A Substantial Impact On The Public's Access To The District Court's Judicial Proceedings

The White House suggests that the issue presented by the Petition is not significant because "at no time have Petitioners been completely deprived of information about the proceedings below." White House Opp. at 5. That suggestion, however, is simply incorrect. On March 20, 1998, the district court held its hearing on the President's assertions of executive and attorney-client privilege. That hearing was held behind closed doors, without any advance public notice, and without any public explanation for the closure. More than two months then passed before the district court, on May 26, finally unsealed a redacted version of the transcript of that hearing. Thus, the public was indeed "completely deprived" of information concerning that hearing—and the arguments being made by both the President and the

Independent Counsel concerning matters of great public interest—for an extended period of time.

Had the district court properly concluded that the First Amendment presumption of access applied to the March 20 hearing, the result would necessarily have been far different. The district court would have been required to give advance public notice of its intention to hold a closed hearing, and members of the public and press would have been entitled to an opportunity to be heard on the question of their exclusion. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982). Moreover, the hearing could not have been closed, even in part, unless the district court first made "specific, on the record findings" that "'closure [was] essential to preserve higher values and [was] narrowly tailored to serve that interest'"—findings that have *never* been made in this case. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) ("*Press-Enterprise II*") (quoting *Press-Enterprise v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*")).

Had the district court correctly complied with First Amendment dictates, the March 20 hearing would have been open to the public, at least in part. Significant portions of the March 20 hearing—in particular, those portions in which the President and Independent Counsel discussed their legal positions on the questions of executive and attorney-client privilege—could have been open to the public, without disclosing secret grand jury materials. The redacted transcript of the March 20 hearing, which Petitioners have lodged with the Court, demonstrates that long stretches of that hearing involved solely legal argument, without any revelation of secret grand jury materials. And as the White House points out, *see* White House Opp. at 5, the June 29, 1998 oral

argument on the appeal of the district court's governmental attorney-client privilege ruling—which was heard by the same panel of the court of appeals that heard the instant case—was bifurcated precisely along those lines, amply demonstrating the feasibility of holding such a bifurcated judicial proceeding. Thus, notwithstanding the court of appeals' statement below that such a procedure would be "ridiculous," Pet. App. 12a, that court's own actions show that the March 20 hearing could have been structured so that the historic legal arguments of the President and the Independent Counsel were presented in an open courtroom, with secret grand jury materials discussed during bench conferences or during a separate, closed portion of the hearing.[1]

The district court's finding that "it would be too disruptive to stop the hearing and clear the courtroom every time that Rule 6(e) material is to be mentioned," Pet. App. 41a-42a, falls far short of the type of finding required to justify closure under the First Amendment.[2]

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[1] That an open hearing could be conducted without revelation of secret grand jury materials was persuasively demonstrated by the fact that the Independent Counsel—the only party before the district court that had access to secret grand jury materials and was bound by Rule 6(e)—moved the district court to open the March 20 hearing. *See* Pet. App. 41a.

[2] The White House contends that the district court found that "discussions of the legal issues could not readily be separated from discussions of sealed grand jury material." White House Opp. at 3. But the district court made no such finding. If anything, the implication of the district court's statement at the start of the March 20 hearing was that the "legal issues" *could* be separated from the "sealed grand jury materials," but that, in the district court's view, the mechanics of doing so would be "disruptive."

The First Amendment requires that closure orders be "narrowly tailored" to serve "higher values." *Press-Enterprise II*, 478 U.S. at 13-14. Obviously, closed-door hearings will always be less "disruptive" than hearings that involve bench conferences or that are bifurcated. Thus, the mere avoidance of "disruption" cannot be a "higher value" sufficient to trump the public's right of access, or that right would be far too easily undermined. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (Burger, C.J.) (alternatives to complete closure of criminal trials "admittedly present difficulties for trial courts" but are not "beyond the realm of the manageable"; therefore, such difficulties do not justify complete closure). The district court's desire to avoid "disruption" plainly is not a sufficient basis for complete closure of the March 20 hearing under First Amendment standards.

Accordingly, application of the First Amendment presumption clearly would have dictated that the March 20 hearing be opened to the public, at least in substantial part. Yet, Petitioners and the public were instead prohibited from witnessing any portion of that historic hearing, and were completely deprived of any information about the legal positions taken by the President and the Independent Counsel regarding these vital issues for more than two months while the national controversy raged on.

The White House's opposition does not address the other hearings from which Petitioners were excluded. But, lest there be any doubt about the impact of the lower courts' rulings, it is noteworthy that, as of the filing of this reply brief, the district court *still* has not unsealed *any* transcripts of the March 4, 1998 hearing on Francis D. Carter's attorney-client privilege objections, or the March 12, 1998 hearing on the President's show-

cause motion. Thus, Petitioners and the public have been deprived of access to the contents of those hearings for more than four months.

Moreover, the ruling of the court of appeals has had a continuing detrimental impact on public access to judicial hearings relating to Mr. Starr's investigation. Even since the filing of this Petition, the district court and circuit court have continued to hold unannounced, unexplained closed-door judicial hearings relating to the investigation. *See, e.g.*, Peter Baker, *Secret Service Motion Spurned*, Wash. Post, July 16, 1998, at A1 (reporting that the district court held a closed-door hearing on July 15 regarding the Justice Department's motion to stay enforcement of subpoenas to Secret Service agents); John M. Broder, *Court and Principals in Lewinsky Matter Meet in Secret*, N.Y. Times, Jul. 22, 1998 at A16 (reporting on D.C. Circuit's July 21 closed-door hearing, reportedly relating to an appeal from the district court of a ruling relating to alleged "leaks" by the Office of Independent Counsel).

III. Contrary To The White House's Assertion, The First Amendment Issue Is Squarely Presented

The White House argues, albeit in highly ambiguous terms, that it is "far from clear" that the First Amendment issues are "squarely presented," suggesting that Local Rule 302 and Fed. R. Crim. P. 6(e) "appear" to "resolve this dispute conclusively against Petitioners." White House Opp. at 13. That argument is entirely meritless. There is no doubt that the First Amendment argument was squarely presented to, and squarely rejected by, the court of appeals, and that resolution of the First Amendment argument in Petitioners' favor would change the result reached below. Neither Local Rule 302 nor Federal Rule 6(e) could "conclusively" resolve

the question against Petitioners if the First Amendment—which obviously trumps such rules—provides a right of access.

In any case, nothing in either Local Rule 302 or Federal Rule 6(e), as interpreted below, forbids a district court from permitting public access to portions of judicial proceedings that do not reveal secret grand jury materials.[3] Accordingly, those rules are not the least bit inconsistent with recognition of a First Amendment presumption of access.

The White House also incorrectly suggests that "the Petition does not challenge the shared conclusion of both courts below . . . that public attendance at the hearings would be disruptive." White House Opp. at 14. The district court reached that "conclusion" solely with respect to its March 20, 1998 hearing, and the Petition specifically argues that the March 20 hearing "could easily have been open to the public without causing any serious disruption, and no compelling interest warranted closure of the hearing." Pet. at 29. Thus, the Petition quite obviously *does* challenge the district court's "disruption" finding, as well as the notion that

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[3] Local Rule 302, read literally, suggests that all ancillary hearings conducted in the United States District Court for the District of Columbia must be closed to the public. But the court of appeals correctly interpreted that rule "to mean only that, as an initial matter, all proceedings relating to the grand jury shall be closed, subject to an order opening the proceedings." Pet. App. 10a. Thus, Local Rule 302, as interpreted below, would not forbid the district court from opening ancillary hearings to the public upon a finding that doing so is required by some other authority, such as the First Amendment. Based upon that interpretation of Local Rule 302, Petitioners would have no basis for challenging that rule as inconsistent with the First Amendment.

such a finding was sufficient to justify complete closure of the March 20 hearing.

CONCLUSION

The Court should use this opportunity to resolve important issues concerning the public's First Amendment rights of access to judicial proceedings, including proceedings involving matters of overwhelming public interest and significance such as those at issue in this case. The petition for a writ of certiorari should be granted.

Respectfully submitted.

July 22, 1998

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